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No. 52470-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CRAIG and KELLEY TURNER,

Appellants,

v.

GORDON BALDWIN; NORMAN SIMON, BARBARA SIMON;  
MARK TAYLOR; SARAH TAYLOR; PIERCE COUNTY; and STATE  
OF WASHINGTON SHORELINES HEARINGS BOARD,

Respondents,

and

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Agency with Jurisdiction/Other Party, Respondent

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**BRIEF OF RESPONDENTS MARK AND SARAH TAYLOR**

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GORDON THOMAS HONEYWELL LLP  
Margaret Y. Archer, WSBA No. 21224  
Attorneys for Respondents Taylor

Suite 2100  
1201 Pacific Avenue  
Tacoma, WA 98401-1157  
(253) 620-6500

[4841-6062-7346]

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## **I. INTRODUCTION**

Petitioners Craig and Kelly Turner propose a 150-foot pier, single-use ramp, float and boatlift on the northeast shoreline of Hale Passage at Point Fosdick. They also propose a boathouse, approximately 22 feet upland and near the boundary opposite of the dock.

The Turners' proposed dock would be the only dock on a more than six-mile stretch of shoreline. To the west of the Turner property, the nearest dock is located at the public boat launch at the mouth of Wollochet Bay – a little more than a mile away. To the east, there are no docks for over six miles – a person must travel all the way to the Narrows Bridge and beyond to the Gig Harbor Bay area to find a dock.<sup>1</sup>

Following a three-day evidentiary hearing that included a site visit and testimony from 14 witnesses, the three-member panel of the Shoreline Hearings Board unanimously found that the proposed dock does not qualify for a shoreline substantial development permit under the Pierce County Shoreline Master Program (“SMP”), applicable Pierce County Shoreline Regulations or the Shoreline Management Act. (*See Findings of Fact, Conclusions of Law and Order on September 1, 2017* (“Board

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<sup>1</sup> See maps and aerial photographs at Appendix A to this brief depicting location of the project site and its proximity to petitioners' properties and the nearest docks. The photographs are located in the Clerk's Papers. (“CP”) at CP 533-35, 761.

Order”).<sup>2</sup> More specifically, **the Board found that the proposed dock failed to meet three separate and independent permit criteria set forth in the County Code and likewise failed to comport with stated Pier Policies in the SMP.**

First, the Shoreline Hearings Board found that the dock would obstruct and impair marine oriented recreation on a thoroughfare heavily trafficked by boaters traveling to multiple destinations (including Wollochet Bay, Gig Harbor Bay, Fox Island and Tacoma), paddle boarders and kayakers. The dock is proposed to be located at the south tip of Point Fosdick, which is exposed to the weather and subject to strong currents and waves. As a matter of safety, paddle boarders and kayakers hug the shoreline to avoid the treacherous currents. Boaters likewise habitually hug the shoreline as they cut around this point toward their destination. A dock protruding 150 feet into the shoreline would obstruct and impair this major thoroughfare and potentially place the many members of the public who frequent it into harm’s way. Under PCC 20.56.040(A)(1), this obstruction or marine oriented recreation alone disqualified the proposed dock for a shoreline substantial development permit.

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<sup>2</sup> The Board’s September 1, 2017 Findings of Fact and Conclusions of Law are located in the CP 565-597 and are attached as Appendix B for convenient reference.

Second and independently, the dock was disqualified under PCC 20.56.040(A)(5) because the Board found that the Turners have available to them three different reasonable alternatives to the proposed dock. A mooring buoy, nearby commercial moorage or separate moorage privately owned by the Turners' closely held LLC each present a reasonable alternative to a newly constructed dock on this otherwise dock-free shoreline.

Finally, third, the Board concluded that the dock did not qualify for a shoreline permit under PCC 20.56.040(A)(7) because the intensity of the use is not compatible with the surrounding environment, land and water uses. The Board found that the introduction of a 150 pier, ramp, float would radically alter the unique character of this dock-free shoreline and would be incompatible with the beach walking, kayaking, paddle boarding and boating the public regularly and frequently enjoys on this shoreline.

The Shoreline Hearings Board also found that the boathouse proposed to be located within 50 feet of the shoreline did not qualify for a shoreline conditional use permit. The Board agreed with the Pierce County Hearing Examiner's interpretation of the County Code and concluded that the primary use of the structure proposed in this case is not a water dependent use and thus, could not be located within 50 feet of the shoreline under the County's Shoreline Regulations. PCC

20.62.050(D)(2), The Shoreline Board further found that the boathouse would unduly impact the Taylors' view of Hale Passage and the Olympic Mountains, which independently disqualified it for a permit under PCC 20.62.050(D)(2)(a).

To prevail on this Administrative Procedure Act ("APA") appeal, the Turners must demonstrate that Shoreline Hearings Board erred with regard to each and every independent basis upon which it found the dock and boathouse did not qualify for a shoreline permit. The questions presented were largely fact intensive. To make their Findings of Fact, the Board necessarily assessed credibility of multiple witnesses and weighed both the testimony and documentary evidence. The Turners disagree with several of the Board's findings and conclusions drawn from the evidence. But disagreement is not enough to prevail on this APA appeal in which the Court is directed to conduct a deferential review of the Board's factual findings and interpretation of applicable shoreline regulations. The Turners may point to isolated testimony that contradicts the Board's findings (made after considering and weighing competing evidence), but they cannot demonstrate that the findings are not supported by the substantial evidence in the record. The Turners likewise cannot demonstrate that the Board misapplied applicable shoreline regulations to the specific facts of this case. The Turners cannot meet their burden on

this appeal and the Court should affirm the Shoreline Hearings Board's decision to deny the shoreline permits.

## II. FACTS

### A. The Applications, Shoreline Permit Decisions, And Appealing Parties

The Turners own property at 16 Point Fosdick Drive NW in Gig Harbor that fronts the shoreline of Hale Passage at Point Fosdick. (CP 567, Unchallenged Finding of Fact (“FOF”) 1.)<sup>3</sup> They applied for a shoreline substantial development permit (SSDP) to build a 150-foot pier, ramp, and float (“dock”) to be situated toward the western edge of their shoreline property. (*Id.* at Unchallenged FOF 3.) They also sought a shoreline conditional use permit (SCUP) for a 20-foot long, 10-foot wide boatlift at the end of the dock to prevent the boat from grounding at low tide. (*Id.*) Finally, the Turners proposed to construct a 12-foot high “boathouse” (with a 192 square foot footprint) at the eastern edge of their property, 22 feet landward from their bulkhead. This structure would be

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<sup>3</sup> Unchallenged Findings of Fact are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). In their Petition for Judicial Review filed with the Superior Court, the Turners assign error to Findings of Fact 8, 9, 12, 13, 18, 19, 24, 26, 33-35, 40 and 41. (*See* CP 21-23.) The Turners attempt to expand their assignments of error in their opening brief to this Court. More specifically, the Turners assign error for this first time in this judicial appeal to Findings of Fact 3, 7, 15 for characterizing the dock as a single-use facility. (Turner Brief at p. 6, ¶ 6.) They also assign error for the first time to Findings of Fact 22, 23, 25 and 27 on the issue of available reasonable alternatives to a dock. (Turner Brief at p. 6, ¶ 9.)



situated on the opposite end of the property from the dock and upland, but near a planned swimming pool. (*Id.*) The Pierce County Hearing Examiner approved a SSDP for the dock and a SCUP for the boatlift but denied the requested SCUP for the boat house. (CP 604-605).

Respondents Mark and Sarah Taylor,<sup>4</sup> who own and reside on the adjoining shoreline property immediately to the east, appealed the Examiner's decision to approve the dock and boatlift, as did petitioners Baldwin and Simon, who own the two properties immediately to the west. (CP 248-318, 761; 951, 1096, 1131.) The Turners, in turn, appealed the Examiner's decision denying the proposed boathouse (CP 319-358); and the Taylors intervened to oppose the boathouse appeal (CP 453-458). All three shoreline appeals were consolidated under the above-caption. (CP 430-439.)

**B. The Dock and Boatlift Proposed On a Seven-Mile Stretch Of Dock-Free Shoreline**

The dock is proposed to be located on the northeast shore of Hale Passage, across from Fox Island at Point Fosdick. (CP 627, 849.) The project site is on a low bank shoreline; the bulkhead fronting the property is only approximately 3 feet, 5 inches high. (CP 953-954, 1132.) The beach in this area consists of sand and pea gravel (CP 629) and is regularly

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<sup>4</sup> The Taylors live at 14 Pt Fosdick Drive. (CP 951).

used by many beach walkers who visit or live along or near this shoreline (CP 955-957, 975-976, 1020-1021, 1026, 1039, 1078-1079, 1098.)

Though this shoreline is improved with homes and bulkheads, there are no docks anywhere near the site. In fact, if allowed, the dock will be the first and only dock on an approximately seven mile stretch of shoreline. To the west of the Turner property, the nearest dock is a little more than a mile away, located at the public boat launch at the mouth of Wollochet Bay. To the east, there are no docks for over six miles – all the way to the Narrows Bridge and beyond to the Gig Harbor Bay area. (CP 570, Unchallenged FOF 10, 849, 857-859; 993, 1062-1063, 1175.) Pierce County Planning and Land Services (“PALS”) Staff acknowledged in the Staff Report that proposed dock and float are out of character for the area. (CP 627, 636-638; CP 1174-1176.)

The Turners proposed dock would be situated at the south tip of Point Fosdick (AR 602), which is exposed to weather events and subject to strong currents and waves. (CP 569-570, Unchallenged FOF 10; 1025, 1078, 1100.) It is also within a heavily trafficked waterway used by recreational boaters, kayakers and paddle boarders traveling to multiple destinations, including Wollochet Bay and Gig Harbor Bay. As a matter of safety, paddle boarders and kayakers hug the shoreline to avoid the treacherous currents. (CP 569-570, Unchallenged FOF 10, 11; 963-966,

1007-1009, 1022-1023, 1083. *See also* photographs at CP 892-894, 896, 913.) A dock at this location would force kayakers and paddle boarders to paddle further out into the deeper open waters of Hale Passage to navigate around the dock, exposing them to the dangers presented by the strong currents and waves they are currently able to avoid. (CP 638, 1032-1036.) Likewise, boaters habitually hug the shoreline as they cut around this point toward their destination. A dock protruding 150 feet into this shoreline would unquestionably obstruct and impair this major thoroughfare; and, because visibility of the dock will be limited for boaters coming around the point, create a boating hazard. (CP 1004-1009, 1083-1086.)

The introduction of such a hazard, however, is wholly unnecessary, since the Turners have suitable available alternatives to the proposed dock. Initially, it should be noted that the dock and boatlift will have only limited functional utility. It would be imprudent to use the dock for mooring during the extended months of high winds and wave action. (CP 1040, 1042, 1051.) During the approximately four months of suitable boating weather conditions, the dock will still have limited utility. The dock and boatlift will “go dry” because of lack of water depth during daily low tides, precluding its use for water access during those times. (CP 636, 903, 1057-1058, 1179, 1187.)

But the Turners do not need this limited functioning dock. The

Turners, through an LLC, acquired shoreline property located at 2916 Harborview Drive, along with accompanying DNR lease rights for the adjacent tidelands. This property is in close proximity to their home, a fifteen-minute drive, and is already improved, and has historically been used, for boat moorage.<sup>5</sup> (CP 574, Unchallenged FOF 22, 1102, 1117, 783-847.) Thus, the Turners have available to them a reasonable alternative to the proposed dock.<sup>6</sup> Of course, the Turners could also utilize a mooring buoy, in conjunction with a dinghy, to moor and access their boat, just as the predecessor property owners and their neighbors have successfully done for many years. (CP 1076, 1080-1082, 1091, 1136.) Finally, the Turners could utilize one of the multiple commercial moorage facilities in Gig Harbor or the moorage facility at Day Island as their neighbors and predecessor owners have done. (CP 1003-1004, 1013, 1022, 1097.)

**C. The “Boathouse” Proposed On The Opposite Side Of The Property**

The Turners also propose to locate a “boathouse” on the eastern side of their property, set back 3 feet from the common boundary line. As

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<sup>5</sup> The Turners did not disclose their recently acquired property to the Hearing Examiner at the hearing and it was not considered for the Examiner’s “reasonable available alternatives” analysis. (CP 575, 1177-78.)

<sup>6</sup> The Turners do not have a buoy. But, prior to the Examiner hearing, the Taylors approached the Turners and offered to buy them a mooring buoy and dinghy as an means of boat storage alternative to the proposed dock. (CP 986.)

originally proposed, the structure would have been located 5 feet landward from the Turners' bulkhead and a height of 18.5 feet. (CP 1180, 766-767.) During the County Hearing Examiner proceeding, the Turners informed the Examiner and the Taylors that, to address the Taylors' view concerns, they would relocate the structure further upland. While a precise location was not disclosed at the time, they submitted a revised plan after the hearing. (CP 772-773.) Under the revised plan the boathouse was located 22 feet from the bulkhead and the height was reduced to the height of 12 feet (presumably because the changed topography eliminated the need for the structure to have two levels). (CP 770, 772-773, 1181. *See also*, CP 278, Unchallenged FOF 5.) Unfortunately, the new location did not mitigate the proposed structure's view impacts to the Taylors. It will substantially obstruct the Taylors water view and completely obstruct their view of the Olympic Mountains. (*See* CP 982-985; 906-907.) After participating in the site visit as part of the Shoreline Board proceedings, Mojgan Carlson, the Pierce County Planner assigned to this application, concluded that the proposed boathouse will impact the Taylors' view. (CP 1181.)

Though labeled a boathouse, the Turners have acknowledged that a significant use of the structure would be as a pool house. (CP 986-87, 1214-1215.) The structure is proposed to be situated on the opposite side

and upland from the proposed dock, but in very close proximity to a planned swimming pool and an outside shower just outside the boathouse. (*Id.*; CP 568, Unchallenged FOF 5.) The Turners also intend to store kayaks, life jackets and fishing poles in the boat house. (CP 568, Unchallenged FOF 5.)

**D. The Turners' Evolving Petition For Judicial Review.**

As noted earlier, the Board reversed the Hearing Examiner's approval of the single-use dock, finding that the proposed dock did not satisfy three of the seven permit criteria. The Board affirmed the Examiner's denial of the requested shoreline conditional use permit for the proposed boat house. (Board Order at Appendix B (CP 565-597.)

The Turners timely filed with the Superior Court a Petition for Judicial review of the Board Order pursuant to the APA. (CP 1-42.) After reviewing the record and the legal arguments presented by the parties, the Superior Court concluded that the Turners did not meet their burden under the APA and affirmed the decision of the Board in its entirety. (CP 1593-95.)

Though this Court reviews the Board Order directly, certain details of the Turners' challenge in the court below should be considered. The Petition for Review is lengthy, 42 pages, but notably, several issues raised in the Petition were not briefed to or decided by the Superior Court.

(*Compare* CP 1-42 to CP 1446-1469 and CP 1577-1588.) For example, the Turners did not brief or ask the Superior Court to decide any of the “as applied” constitutional issues raised in their opening brief to this Court. (*See* issues presented at CP 1447-1449.) As a result, the Superior Court did not consider or evaluate the abandoned constitutional issues. (*See* Superior Court Order Denying Appeal at CP 1593-1595.)

The Turners’ assignments of error to the factual findings by the Board likewise do not comport to the assignments of error presented in their opening brief to this Court. In their Petition for Judicial Review filed with the Superior Court, the Turners assigned error to Findings of Fact 8, 9, 12, 13, 18, 19, 24, 26, 33-35, 40 and 41. (*See* CP 21-23.) But the Turners attempt to expand their assignments of error in their opening brief to this Court. More specifically, the Turners assign error for this first time in this judicial appeal to Findings of Fact 3, 7, 15 for characterizing the dock as a single-use facility.<sup>7</sup> (Turner Brief at p. 6, ¶ 6.) They also assign error for the first time to Findings of Fact 22, 23, 25 and 27 on the issue of available reasonable alternatives to a dock. (Turner Brief at p. 6, ¶ 9.)

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<sup>7</sup> Notably, even the Hearing Examiner that approved the requested shoreline substantial development permit for the dock characterized the Turners’ dock as a single-use dock. (*See* CP 610 at Finding 7, CP 622.) The Pierce County Planning Staff also characterized the proposed dock as a single-use dock. (CP 627.) The Turners did not contest the Examiner’s characterization in any of the proceedings below.

The APA precludes review of issues not raised below. RCW 34.05.554; *Bowers v. Pollution Control Hearings Board*, 103 Wn. App. 587, 597, 13P.3d 1076 (2000); *B&R Sales, Inc. v. Washington State Department*, 186 Wn. App. 367, 382, 344 P.3d 741 (2015). This Court likewise may refuse to consider issues that were apparently abandoned before the trial court. *Seattle First National Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 243, 588 P.2d 1308 (1978). The Turners should not be permitted to assign error to factual findings that were necessarily deemed verities by the trial court below. They likewise should not be permitted to revive issues that were abandoned below and, thus, not subject to the initial trial court scrutiny contemplated by the APA.

### **III. STANDARDS OF REVIEW**

The Administrative Procedure Act, Chapter 34.05 RCW, governs and limits the judicial review of this matter. RCW 90.58.180(3). This Court reviews the Board's decision directly and review is confined to the record established before the Board. *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 201-02, 884 P.2d 901 (1994). The reviewing court may only overturn the Board's decision under the APA for the reasons set forth in RCW 34.05.570(3). *Id.* While the Taylors had the burden of proof on their dock appeal before the Board, on this APA appeal, the Turners carry



the burden of demonstrating the invalidity of the Board's actions. *May v. Robertson*, 153 Wn. App. 57, 73, 218 P.3d 211 (2009). Here, the Turners challenge the Board's decision primarily on the grounds that it erroneously interprets or applies the law, is not supported by substantial evidence, or is arbitrary and capricious.

While the court reviews the Board's pure decisions of law *de novo*, the court must afford "substantial deference" to the Board's legal interpretations given its specialized knowledge and expertise. *Puget Sound Water Quality Defense v. Municipality of Metropolitan Seattle*, 59 Wn. App. 613, 617, 800 P.2d 387 (1990); *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 589, 870 P.2d 987 (1994); *see Cornelius v. Washington Dept. of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015) (stating agency decision of law is entitled to "great weight"). Reviewing courts "give due deference to the Board's specialized knowledge and expertise, unless there is a compelling indication that the agency's regulatory interpretation conflicts with the legislature's intent or exceeds agency's authority." *Samson v. Bainbridge Island*, 149 Wn. App. 33, 43, 202 P.3d 334 (2009).

Determinations of fact are reviewed under the substantial evidence standard, which is "highly deferential" to the agency fact finder. *Nations Capital Mortg. Corp. v. State Dept. of Financial Institutions*, 133 Wn.

App. 723, 738, 137 P.3d 78 (2006). Factual review under the substantial evidence test requires the Court

to view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.

*State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992). *See also, Dep't of Corrections v. City of Kennewick*, 86 Wn. App. 521, 529, 937 P.2d 1119 (1997). Of course here, the Shoreline Hearings Board was the highest forum to exercise fact-finding authority; the Court reviews the Board decision, not the decision of the County's Examiner. *Buechel v. Dep't of Ecology*, *supra*, 125 Wn.2d at 202. A finding is supported by substantial evidence when "it would convince an unprejudiced, thinking mind of the truth of the declared premise." *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). The court should not weigh the "credibility of witnesses or substitute [its] judgment" for the agency's regarding a finding of fact. *Port of Seattle*, 151 Wn.2d at 568. The Board's factual findings should only be overturned if they are clearly erroneous in light of the entire record; in other words if the court is "definitely and firmly

convinced that a mistake has been made.” *Port of Seattle*, 151 Wn.2d at 588; *Buechel*, 125 Wn.2d at 202.

Last, the Board’s decision may be overturned if it is “arbitrary or capricious.” A decision is arbitrary and capricious if it constitutes “willful and unreasoning action in disregard of facts and circumstances.” *Port of Seattle*, 151 Wn.2d at 589. Even if a different conclusion may have been reached, a decision will not be considered arbitrary and capricious if there is “room for two opinions” and the action taken upon honest and due consideration. *Buechel*, 125 Wn.2d at 202.

**IV.**  
**ARGUMENT IN SUPPORT OF BOARD’S DECISION TO DENY**  
**APPROVAL OF THE PIER, RAMP AND FLOAT<sup>8</sup>**

**A.     Though A Dock Is Conditionally Allowed Under The Pierce County Code And SMA, The Turners Do Not Have An Unfettered Or Even A Preferred Right To Construct A Private Single-Use Dock, Much Less A Constitutional Right.**

The Shoreline Management Act, Chapter 90.58 RCW, is founded upon a recognition that shorelines are fragile and there is an increasing pressure from additional uses that necessitates increased coordination in their management and development. *Buechel, supra*, 125 Wn.2d at 203. The SMA does not prohibit development of the state’s shorelines, and the Taylors have acknowledged throughout these proceedings that, in

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<sup>8</sup> The Taylors join and incorporate by reference the arguments presented by respondents Baldwin and Simon.

appropriate circumstances, private single-family docks may be a reasonable use of certain shoreline property. They also acknowledge that the SMA contemplates balanced consideration of both public and private use of shore lands. But private residential docks do not, as the Turners infer, hold the status of a preferred use as compared to public access to and use of shorelines.

Washington courts have clarified that private single-family docks are not afforded any special priority under the SMA. RCW 90.58.020 provides that, in instances where alterations to the natural shoreline are authorized, priority shall be given to

single-family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other developments that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

The SMA does not, however, make specific reference in this provision to private residential docks or piers as preferred uses. Piers are listed as a preferred use, but they are so listed for improvements that facilitate public access to the state's shorelines. In *Samson v. Bainbridge Island*, the Washington Supreme Court found this distinction meaningful, noting:

The Legislature purposefully distinguished between public and private piers and did not apply any particular preference to the latter, which would limit public access in, rather than promote public access to the waters of the state.

149 Wn. App. at 51.

The SMA “does not permit unmonitored and uncontrolled expansion and multiplication of private docks on public aquatic lands and waters.” *Caminiti v. Boyle*, 107 Wn. 2d 662, 671 (1987).<sup>9</sup> “[T]o the contrary, any such construction is subject to substantial regulation and control.” *Id.* Ultimately, the Board was required to and did apply the SMA, the Pierce County Shoreline Master Program and applicable local regulations to determine if the Turner application qualifies for a substantial development permit. The SMP and County regulations applicable in this case do authorize single-family docks, but only if the applicable criteria, which include compliance with SMP policies, are satisfied.

Those policies and standards do not afford special status or preference to private docks or private property owners, nor is the requisite permit for a dock of this nature ministerial. Rather, as contemplated by the

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<sup>9</sup> Regardless of title to the tidelands, the States sovereignty over tidelands remain and the state holds dominion over the tidelands in trust for the public. *Caminiti*, 107 Wn.2d at 669. The public trust doctrine is met by the controls imposed legislatively by the SMA. *Id.* At 670.

SMA, the standards and policies balance and consider both the rights of the private property owner and the impacts of the private proposal on the public and the neighboring property owners. The standards and policies require the fact-finder, in this case the Board to exercise discretion, after considering all of the applicable circumstances and evidence.

The Turners attempt to elevate their status by unilaterally asserting that they are constructing a joint use dock. The Turners argue that they tend to be social people and they “imagine” lots of people will use the dock. (Turner Brief at p. 22.) But the Turners’ social nature does not transform their proposed single-use dock into a joint-use dock that the Pierce County shoreline policies favor. The County’s shoreline regulations define these terms at PCC 20.56.010 at subsections I and J:

**I. Single Use Pier or Dock.** "Single Use Pier or Dock" shall mean a dock or pier including a gangway and/or float which is intended for the private noncommercial use of one individual or family.

**J. Joint Use Pier or Dock.** "Joint Use Pier or Dock" shall mean a pier or dock including a gangway and/or float which is intended for the private, noncommercial use of not more than four waterfront building lot owners, at least one boundary of whose building lots lies within 1,000 feet of the boundary of the lot on which the joint use pier or dock is to be constructed.

The proposed dock is for use by a single family – the Turner family. This family may or may not choose to invite multiple guests and extended

family members to use their private dock. But under the County's code, the dock remains a single-use dock. That their neighbors rightfully declined to join the Turners to construct this dock as a joint use dock means only that a joint use dock is not available as an alternative. It does not, however, convert the dock to anything other than a single-use dock.

Likewise, the Turners have no constitutional right to construct a dock and the Turners cite no law indicate they have such a constitutional right. They seem to argue that because the local code and SMA affords discretion in the permit decision-making, but they offer no analysis that the discretion afforded renders the SMA or the County's shoreline master plan and regulations somehow unconstitutionally vague.

Moreover, the issue is not appropriately raised on this appeal/ Again, while their petition for review filed with the Superior Court asserted constitutional claims (*see* CP 37-40), those claims were not briefed to or decided by the court below (*see* CP 1446-69, CP 1593-95). An issue not briefed is deemed waived. *Currier v. Northland Services, Inc.*, 182 Wn. App. 733, 182, 332 P.3d 1006, 1010 (2014). The Turners' briefs to the Superior Court did not raise any constitutional claims, and the

trial court did not make any ruling on constitutional claims; it is not appropriate to raise the issue at this late stage in the appellate process.<sup>10</sup>

Finally, the Turners attempt to devalue the Taylors' challenges (as well as their neighbors' challenge) as nothing more than generalized complaints of disgruntled neighbors. The Taylors have never argued that they have unfettered veto power, or that a "first dock" on a shoreline is *per se* prohibited. Rather, the Taylors base their challenge on the SMP policies and the permit criteria. Attempts by the Turners to elevate their own status in this appeal are not supported by the law.

**B. The Board Correctly Concluded That the Proposed Pier-Ramp-Float Does Not Qualify For Approval Under The Pierce County SMP and Applicable Regulations.**

The general substantial development permit criteria applied to single family docks<sup>11</sup> is set forth at Pierce County Code ("PCC") 20.56.040(A), which, are as follows:

**The granting of a Substantial Development Permit is dependent upon the County reviewing authority's determination that the proposed project is consistent**

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<sup>10</sup> The Turners' opening brief to the Superior Court below did make one reference to Article 1, section 23 in a footnote (CP 1460), which says that no law impairing the obligations of contracts shall ever be passed. (But only state legislation implicates the contract clause in the constitution. *Birkenwald Distrib. Co. v. Heublein, Inc.*, 55 Wn. App. 1, 6, 776 P.2d 721, 724 (1989). The brief did not cite to any law passed by the legislature that impairs the Turners' contracts.

<sup>11</sup> Only piers and docks that are less than 50 feet in length and cost less than \$2,500 are exempt from the shoreline substantial development permit requirement. PCC 20.56.030(D).



with the policies of the Master Program and with the following criteria

1. Important navigational routes or **marine oriented recreation areas will not be obstructed or impaired;**
2. Views from surrounding properties will not be unduly impaired;
3. Ingress-Egress as well as the use and enjoyment of the water or beach on adjoining property is not unduly restricted or impaired;
4. Public use of the surface waters below ordinary high water shall not be unduly impaired;
5. **A reasonable alternative such as joint use, commercial or public moorage facilities does not exist or is not likely to exist in the near future;**
6. The use or uses of any proposed dock, pier or float requires, by common and acceptable practice, a Shoreline location in order to function; and
7. **The intensity of the use or uses of any proposed dock, pier and/or float shall be compatible with the surrounding environment and land and water uses.** (Emphasis added.)

Relevant to this appeal, the Board found that the Turner dock proposal did not satisfy criterion 1, 5 and 7, bolded and underlined above.

The above Pierce County Code provisions (as well as WAC 173-27-150(c)) expressly conditions permit approval upon demonstration by the applicant that their proposal is consistent with SMP policies. Thus, the SMP policies have regulatory effect. Policies relevant to this appeal are

found in the Piers<sup>12</sup> Element of the SMP at page 37.<sup>13</sup> The SMP Pier policies encourage piers in conjunction with marina development in appropriate areas (Policy a), but discourage piers associated with single family residences (Policy d). The SMP Pier Policies also encourage the use of mooring buoys as an alternative to space consume piers (Policy f). The Pier Policies provide: "In considering any pier, considerations such as environmental impact, navigational impact, existing pier density, parking availability, and impact to proximate land owner should be considered" (Policy e). Finally, the SMP Pier Policies provides that "priority should be given to the use of community piers and docks in all new major waterfront subdivisions. In general, encouragement should be given to cooperative use of piers and docks." (Policy n).

Here, the Board appropriately considered the relevant SMP policies to apply the implementing shoreline regulations. (CR 339,

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<sup>12</sup> Though the word dock, for brevity's sake, is commonly used to describe structures like that proposed here, the structure does not meet the definition of a dock under the Pierce County Code. The project is more accurately described as an over-the water pier, with a float, thus the Pier Policies in the SMP are applicable. For the Board's reference, the Code defines "pier" as "a structure which abuts the shoreline and is built over the water on pilings and is used as a landing or moorage place for marine transport or for recreational purposes." PCC 20.56.010(B). A "float" is defined as "a number of logs, boards, barrels, etc., fastened together into a platform capable of floating on water, use as a landing or moorage structure for marine transport or for swimming purposes." A "dock," on the other hand, is "a structure which abuts the shoreline and floats upon the water and is used as a landing or moorage place for marine transport or for recreational purposes, but does not include recreational decks, storage facilities, or other appurtenances." PCC 20.56.010(A).

<sup>13</sup> The relevant excerpts from the SMP are at CP 537-539 and are attached as Appendix C for convenience.

Conclusion 10.) The Board ultimately found that that the proposed dock is inconsistent with three of the requisite substantial development permit criteria, which the Board applied in light of the relevant Pier Policies.

**1. The Board correctly concluded that the proposed dock will obstruct or impair marine oriented recreation (PCC 20.56.040(A)(1).**

In this case there was more than substantial evidence to support the Board's finding that the 150-foot dock proposed on this highly used unencumbered, low bank shoreline will obstruct or impair marine oriented recreation. Again, this particular shoreline along Hale Passage, situated at the southern-most point of the Gig Harbor Peninsula, is unique, not just because of the current absence of impeding structures, but also because it is exposed to the weather, subject to strong currents and waves, and along thoroughfare heavily trafficked by boaters, kayakers and paddle boarders. (CP 963-966, 1007-1009, 1022-1023, 1025, 1078, 1083, 1100, 892-894, 896, 913. *See also* CP 569-580, Unchallenged FOF 10, 11.) The testimony established that boaters regularly hug the shoreline and the protruding dock will pose an unexpected hazard as boaters cut around Point Fosdick. (CP 1004-1009, 1083-1086.) To avoid the dock, paddle boarders and kayakers will be forced to paddle further into the open waters and expose themselves to the strong currents and wave action they could otherwise avoid. (CP 638, 1032-1036.)

While the Turners may have presented some competing testimony, the Board weighed the totality of the evidence to find that this dock will obstruct or impair marine oriented recreation in light of the characteristics of this particular shoreline, the conditions of the water at this particular shoreline and the uses of this shoreline. Under the APA standards of review, the Court must decline the Turners' invitation to independently weigh the evidence.

Unlike other permit criteria, PCC 20.56.040(A)(1) does not require a showing of "undue" impairment. Rather, it provides that "marine oriented recreation areas will not be obstructed or impaired." Of course, it is a well-accepted principal of statutory construction that, when a legislative body invokes specific language in one provision and omits it in another provision, the law will presume the omission was intentional. *Seeber v. Public Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981). Though the impairment presented in this unique context does readily rise to the level of "undue," the dock unequivocally fails to satisfy criterion (1), which prohibits obstruction or impairment of marine oriented recreation.

The Turners next cites *Cougar Mountain Assoc. v. King County*, 111 Wn.2d 742, 756 P.2d 264 (1988) and argues that it is legal error to apply a "no impact" standard. But *Cougar Mountain* addressed application

of State Environmental Policy Act (SEPA), chapter 43.21C RCW, more specifically, the appropriate standard or review for SEPA appeals. *Cougar Mountain* does no more than apply express SEPA language to limit expanded environmental review, imposition of conditions or permit denial to cases in which there are significant impacts. *Cougar Mountain* announces no general principals or rules to applied outside the context of SEPA and has no application to this case.

The permit criterion does not set an impossible standard as the Turners infer. Different dock proposals to be located on different shorelines can certainly meet the criteria. As only one example, a dock constructed on high bank properties or within a cove or otherwise less exposed would not present an unacceptable obstruction as presented here.

Finally, the Turners assert that such boat traffic violates the law and that, for purposes of this permit decision, the Court must assume that boaters will comply with the law. The argument is not supported by the record. No legal citations were presented to the Board to support that the law requires boats to stay offshore by 200 feet and that the nearshore speed limit is 5 mph. The cited testimony only establishes that the witness' boater safety class instructed the class members to limit speed to 5 mph until 200 feet from the shoreline. (CP 1333-1334.) The Board did not refuse to consider any legal speed restrictions; none were presented to

them.

Additionally, the Board case cited does not hold that the Board or a Court must assume citizens will comply with the law. *Jennings v. San Juan County*, SHB 97-31, 32, 33, 34 & 40 (1998), states (at Conclusion V) only that the Board will assume that the *applicant* will comply with imposed conditions.

Finally, when assessing safety, it defies logic to assume that boaters will comply with speed limits or other laws when, as is the case here, testimony from multiple witnesses that they have observed boats hugging the shore at high speeds on many occasions.

The Board's findings and conclusion that the proposed dock will obstruct or impair marine oriented recreation is supported by the substantial evidence and a proper application of the Pierce County shoreline regulation.

**2. The Board correctly concluded that the Turners have reasonable alternative to a dock (PCC 20.56.040(A)(5)).**

PCC 20.56.040(A)(5) provides that a dock permit may only be approved if "[a] reasonable alternative such as joint use, commercial or public moorage facilities does not exist or is not likely to exist in the near future." (Emphasis added.) The Taylors acknowledge that the Turners do not have available to them one of the possible alternatives – a joint use

dock – because the neighbors declined to participate. But the Board nonetheless found that the Turners had three reasonable alternatives to a single-family dock – they could use a mooring buoy, a public mooring facility or the pier owned by their wholly owned LLC.

The Turners currently own property on the Gig Harbor waterfront that includes private moorage. The Turners contend this moorage is not a reasonable alternative because the two berths are currently leased to others and expanding the facility would take time and money. C Turner Testimony. The Board is not persuaded by this argument. **The Turners have not presented any persuasive reason why they could not choose to change their leasing arrangements and moor their own boat at their Gig Harbor waterfront pier if they chose to do so.** Mr. Turner testified that the leases could be terminated upon 90 days' notice. C. Turner Testimony. When the Turners purchase a boat, if they wish to continue to allow their tenants to use their Gig Harbor moorage, **they can moor their boat at a nearby marina like some of their other neighbors.** Bowen Testimony; N. Simon Testimony. **Alternatively, the Turners could moor their boat at a mooring buoy like Dr. Baerg, the previous owner of the property.** Baerg Testimony. The Board concludes that a mooring buoy is a workable alternative for this shoreline property. The previous owner of the Turner property testified that he was able to use a mooring buoy for his boats in Hale Passage. Baerg Testimony.

Here, the Board concludes that a number of reasonable moorage alternatives to a single use pier do exist even if the Turners find them less convenient. Therefore, the Turners' proposed single use pier is inconsistent with PCC 20.56.040A.5.

(CP 587, Conclusions 14-15 (Emphasis added).)

In order to establish that the Board erred in concluding that the Turners have available reasonable alternatives to a dock and thus did not satisfy permit criterion 5, the Turners must demonstrate that the Board's findings and conclusions with regard to all three alternatives were not supported by the substantial evidence or legally erroneous. The Turners cannot meet this burden.

**A buoy is a reasonable alternative to a dock.**

The Turners argue that a buoy cannot be a reasonable alternative to a dock because a buoy is not a listed alternative in the code. But PCC 20.56.040(A)(5) does not purport to provide an exhaustive list of alternatives. But the County Code uses the phrase "such as" as a precursor to the alternatives listed. Moreover, the SMP Pier Policies, which must be considered when applying the permit criterion, expressly identify buoys as a preferred alternative. Recall that SMP Policy (d) discourages use of piers associated with single-family residences, while policy (f) encourages the use of mooring buoys as an alternative to piers in front of single-family residences. Any interpretation that PCC 20.56.040(A)(5) does not include a buoy as a potential reasonable mooring alternative to a dock for a single-family whom would contravene the SMP policies the regulation is supposed to implement.

The Turners next state that the Turners wish to moor their boat at



their home year-round. They argue that a mooring buoy cannot, therefore, be deemed a reasonable alternative if it will not provide moorage in the winter months. The Turners reliance on *Walker/Seidl v. San Juan County*, SHB 09-12 (Final Decision, August 27, 2010) for this proposition is misplaced. *Walker/Seidl* does not require that a buoy, to be a reasonable alternative, be viable for any proposed or intended use. Rather, it only need be viable for a “reasonable intended use.” *Id.* at Conclusion 13.

Here, the Turners presented no evidence that winter boating on this turbulent shoreline is a reasonable use. The Turners do not now and have never owned a boat and have little boating experience. (CP 1211-1212, 1344.) The Turners were thus in no position to opine regarding the viability, much less reasonableness of this proposed use. The evidence in the record supports the opposite conclusion. Those that have regularly boated along this shoreline testified that, because of the strong winds and currents, the boating season does not extend much beyond April to September. (CP 1025, 1040, 1042, 1078, 1100.) A mooring buoy is an available and appropriate alternative, and the method successfully used by the Turners’ neighbors along the shoreline and their predecessor owners.<sup>14</sup> (CP 1076, 1080-1082, 1091.)

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<sup>14</sup> Notably, all but one of the waterfront property owners along this shoreline signed a petition opposing the proposed dock. (CP 909-911) Property owners who moor boats on this shoreline utilize a buoy. (See CP 1076, 1080-1082, 1091.)

The Turners argue that a buoy is not convenient. But the Shoreline Hearings Board has held that an applicant must demonstrate a dock is actually needed for moorage, not simply more convenient. *Walker/Seidl v. San Juan County*, SHB 09-12 (Final Decision, August 27, 2010) at Conclusion 8. It has also unequivocally held that feasibility of available alternatives should be evaluated without regard to individual age or physical limitations. *Id.* at Conclusion 8.

Finally, the Turners state that they desire this dock for more than mooring and boat access. They wish to use it as a viewing, fishing, picnicking and as party deck. They argue that neither a buoy nor a commercial pier will accommodate this desire. But piers and docks only gain their status as appropriate shoreline structures because they can provide access to water craft. *See* WAC 173-26-201(2)(d) (“the act establishes policy that preference be given to uses that are unique to or dependent upon a shoreline location.”); WAC 173-26-231(3)(b) (“New piers and docks shall be allowed only for water dependent uses or public access. As used here, a dock associated with a single-family residence is a water-dependent use **provided that** it is designed and intended as a facility for access to watercraft...”). Moreover, fishing, picnicking, viewing and partying can occur without a pier or dock – any time of year,

provided of course any one would actually want to partake in such activities when the weather is cold and turbulent.

**The Turners' private pier provides a reasonable alternative to a dock.**

The Turners argue that the order “invited if not ordered the Turners to disregard Harbor Point’s separate legal status and raid its holdings to satisfy personal interests.” But the Board did not direct Harbor Point to take any action. It simply concluded that the Turners, the sole members of the LLC, could choose to utilize the Harbor Point pier for mooring their own boat. The Board identified that choice as only one of three reasonable alternatives available to the Turners. The Board also concluded that the Turners could “moor their boat at a nearby marina like some of their other neighbors” or “could moor their boat at a mooring buoy like Dr. Baerg, the previous owner of the property.” Board Order, Appendix B, at 23.

The Board did not *require* that the Turners use one of Harbor Point’s moorings but concluded that it was one of multiple reasonable alternatives. The Turners are not faced with a decision to either forgo a moorage or raid their business assets for personal interests. They have a choice. The Turners also have two other completely reasonable alternatives available to them that do not impact Harbor Point – public moorage at a marina and a mooring buoy. The availability of those other

two reasonable alternatives would have led the Board to deny the SSDP regardless of the availability of the Harbor Point pier.

**3. The Board correctly concluded that the intensity of the use or uses of the proposed dock, pier and float is not compatible with the surrounding environment and land and water use (PCC 20.56.040(A)(7)).**

Again, SMP Policy (d) discourages use of piers associated with single-family residences. Pier Policy (e) provide: “In considering any pier, considerations such as environmental impact, navigational impact, existing pier density, parking availability, and impact to proximate land owner should be considered.” (Emphasis added.) The Board considered these SMP policies when it applied PCC 20.56.040(A)(7) to the Turners’ proposal to construct a 150-foot pier, ramp, float on this otherwise dock-free, low bank shoreline and concluded that the permit criterion was not satisfied.

Here, the existing pier density is zero – there are no existing piers or docks within miles. Insertion of the proposed pier and dock will be wholly out of character for the area. It could also pave the way for more single use docks, taking this shoreline in the opposite direction of all the noted Pier Policies. This long dock extending from a 3-foot eight-inch bulkhead over waters with uniquely strong currents will also interfere with the many other public uses of this shoreline.

The Turners argue that their dock application must be judged on the adopted criteria for approval, without any regard to the status of the project as the first dock application on this six-plus mile stretch of shoreline. But their argument necessarily invites the Court to, improperly, disregard Pier Policy (e), which requires consideration of pier density and PCC 20.56.040(A) and WAC 173-27-150(1)(c), which both direct that consistency with the SMP as a prerequisite to permit approval. The argument also improperly invites the Court to ignore the PCC 20.56.040(A)(7) permit, which requires consideration of compatibility in light of the intensity of the proposed use as compared to other public uses.

Moreover, the context of the surrounding area is critical to evaluation of this or any other dock application to determine consistency with stated SMP policies and subjective permit criteria that require the exercise of discretion. While the status of first dock, by itself and in a vacuum, may not be determinative, the applicable SMP policies and regulations must nonetheless be applied with consideration of all the facts, including that this would be the first pier on an expansive stretch of shoreline that is regularly used by the public. *See Gennotti v. Mason County*, SHB No. 99-011 (Final Decision, October 29, 1999); *Viafore v. Mason County*, SHB No. 00-03 (Final Decision September 24, 2000).

The Turners cite *Inskeep v. San Juan County*, SHB No. 98-033, (Final Decision, April 16, 1999), which held that the status of first dock is not, by itself, determinative; “more important is the extent to which it will constitute a visual presence on the environment and the significance of the man-made alteration,” as well as the extent it will impair access and use. (Turner Brief at p. 19, note 17.)

But *Inskeep* was context driven and does not instruct that the status of first in time cannot be considered in evaluating a dock proposal. There, unlike here, mooring buoys were impracticable and other reasonable alternatives to the proposed joint dock were not available. Also unlike here, the dock was proposed on high bank property. Based on the topography, the Board found that the joint use dock would be “low profile,” not be an “undue intrusion on the shoreline,” and would “not interfere with the aesthetic use and enjoyment of the shoreline.” (Finding X, Conclusion VI.)

But the Board has considered other “first dock” proposals in the context of different surrounding conditions and, considering the totality of the facts and circumstances, concluded that the docks do not qualify for approval. For example, in *Viafore v. Mason County*, SHB No. 00-03 (Final Decision September 24, 2000), the Board denied a shoreline substantial development permit for a dock on the eastern shore of Pickering Passage

across from Harstene Island. The Board found the proposed dock would unduly impact otherwise unobstructed views on the extensive shoreline that had almost no dock development; and, further, could lead to cumulative effects of “substantial degradation and corresponding reduction in public rights resulting from multiple docks on what is now a relatively pristine shoreline environment.” *Id.* at Conclusion VI.

In *Gennotti v. Mason County*, SHB No. 99-011 (Final Decision, October 29, 1999), the Board rejected a single-family dock proposed for construction on the North Shore of Hood Canal where the area was well developed with single family homes on lots of less than 100 feet in width. *Id.* at Finding VI. With regard to the presence of other docks in the area, the Board noted:

Piers and docks are common along various stretches of Hood Canal. However, they are not common on the North Shore near this proposed project. There are occasional concrete boat ramps along the shoreline and some floats in the water. Otherwise there are no protruding structures beyond the bulkhead. Several docks and piers existed in the area in the 1970s but these have long since disappeared. There are no existing piers or docks for miles in either direction of the [applicant's] property.

*Id.* at Finding VII. After considering all the facts, circumstances and applicable policies and criteria in that case, the Board concluded:

The proposal would obstruct views and cause conflicts with recreational uses. It is a single-use

dock in tidal waters where cooperative uses of docks and piers are particularly favored. We note that the [applicant] did attempt to interest at least one neighboring property owner to join in their project, but a joint-use facility did not result. Finally, we conclude the project is not consistent with the policy that it be designed and located in a manner compatible with the shoreline area where it would be located. This pier-dock-float would be the only structure for several miles in either direction. We recognize that that the cove and gentle beach at issue are not pristine or unaltered to the residential development on the shoreline. Nevertheless, the area is currently devoid of any large structures protruding into the water. If allowed, the proposed pier dock float would not be compatible with the shoreline area where it would be located.

*Id.* at Conclusion VI. The first dock status was not determinative, but it was a factor appropriately considered in the context of all the surrounding circumstances. The law does not preclude the Board or this Court from considering that the proposed dock will be first dock – so long as that factor is not determinative by itself and is considered in context.

The Turners also rely on *May v. Robertson*, 153 Wn. App. 57, 218 P.3d 211 (2010). But *May* does not support the Turners' application. Again, the ultimate decision considered the applicable policies and permit criteria in the context of all relevant facts in the particular case. In *May* the applicants proposed a joint use dock and review of the decision reveals that this fact was central to the court's conclusions. The court relied heavily on Pierce County policies that strongly encourage joint use



facilities. The court also noted the existence of other overwater structures (several 50-foot piers and one 150-foot dock) and a heavily developed, upland shoreline, whereas in the present case no protruding overwater structures exist for more than a mile in one direction and over six miles in the other. The *May* case does not support the present dock. In fact, the court describes shoreline in *May* as follows.

...The parties' exhibit photographs show that the surrounding beach area contains significant residential development including existing piers, waterfront structures, seawalls, bulkheads, and moorage devises.

153 Wn. App at 87. The court then determined, in context, that the proposed joint use pier would not conflict the area's existing land and water uses. Such is not the case for the single use dock proposed here, which unlike in *May*, is inconsistent with the SMP Pier Policies.

**V.  
ARGUMENT IN SUPPORT OF BOARD'S DENIAL OF  
CONDITIONAL USE PERMIT FOR THE TURNERS' PROPOSED  
BOATHOUSE<sup>15</sup>**

For lot lines abutting the ordinary high-water line, PCC 20.62.050(C) requires any buildings and structures be setback 50 feet from the lot line, except for docks, floats, bulkheads, buoys, launching ramps

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<sup>15</sup> The Taylors join in and incorporate by reference the arguments presented by respondent Department of Ecology.

and jetties. PCC 20.62.050(D)(2) provides certain limited exceptions to this special setback for water dependent accessory uses:

**Any water dependent accessory use may be allowed within the 50 foot setback upon the issuance of a Conditional Use Permit.** The issuance of a Conditional Use Permit shall be predicated upon a determination that the project will be consistent with the following Conditional Use criteria, and the Conditional Use criteria listed in WAC 173-14-140, and will cause no reasonable adverse effects on the environment and other uses.

Conditional Use Criteria:

a. **Views from surrounding properties will not be unduly impaired.** ... (Emphasis added.)

Thus, relevant to this case, to qualify for a conditional use permit, the proposed structure must be a “water dependent use,” and it cannot unduly impair views from surrounding properties.

Both the Board and the Examiner (and the Superior Court) correctly concluded that the structure proposed does not qualify as a water dependent accessory. “Water Dependent Uses” are defined at PCC 20.04.670, as “all uses which cannot exist in any other location and are dependent on the water by reason of the intrinsic nature of the operation.” Boathouse is defined at PCC 20.04.030 as “a covered or enclosed moorage space.” Thus, structures meeting the definition of a boathouse would ordinarily qualify as a water dependent use. But in this case, the proposed

structure is a boathouse in name only, and it certainly is not water dependent. The Board correctly evaluated the proposed structure.

The proposed site for the boathouse is 22 feet from the bulkhead and on the opposite end of the property from the proposed dock. Further, it abuts the lawn next to the proposed swimming pool. Given the location of the proposed boathouse (directly next to the pool and across the entire beach frontage from the dock), the testimony the Turners acknowledging that the boathouse was to operate both as a pool house and boathouse, it is hard to imagine this particular boathouse as a water dependent use. The intrinsic nature of the use would have to dictate that the boathouse could not exist in any other location in order to support a finding that the boathouse is water dependent. The Board correctly noted that the Taylors have successfully stored their kayaks and paddle boards on their property, as have the Turners. Storage need not be located by the water.

Even if the proposed structure qualified as a water dependent use, it still did not qualify for a conditional use permit because it will unduly impair the Taylors' view. The substantial evidence in the record establishes that the boathouse will radically alter the Taylors view such that their view of the water will be substantially impaired and their view of the Olympic Mountains will be lost. (CP 982-85, CP 861-73.)

The Board correctly concluded that the Turners' proposed

boathouse did not qualify for a shoreline conditional use permit.

**VI.**

**RAP 18.1 REQUEST FOR ATTORNEYS' FEES**

RCW 4.84.370 provides that if a party prevails or substantially prevail on appeal to the Court of Appeals, and also prevails before the Shoreline Hearings Board and before the Superior Court below, that party is entitled to recover reasonable attorneys' fees and costs incurred on appeal. *See also, de Tienne v. Shoreline Hearings Board*, 197 Wn. App. 248, 291, 391 P.3d 458 (2016). The Taylors prevailed before the Board and the Superior Court below and, if they prevail on this appeal, are entitled to recover their attorneys' fees and costs.

Without analysis or argument that the statute applies on this appeal of a shoreline decision or that the Turners would qualify, the Turners assert they should be awarded attorneys' fees pursuant to RCW 4.84.340 and 4.84.350, known as the Equal Access to Justice Act. The Act authorizes a fee award to a "Qualified Party" for certain successful challenges to an agency action. The Act has no application, however, where the challenged decision is made by a purely adjudicatory body in the course of an adjudicatory proceeding. *Duwamish Valley Neighborhood Pres. Coal. v. Central Puget Sound Growth Management Hearings Board*, 97 Wn. App. 98, 100, 982 P.2d 668 (1999).

**VII.  
CONCLUSION**

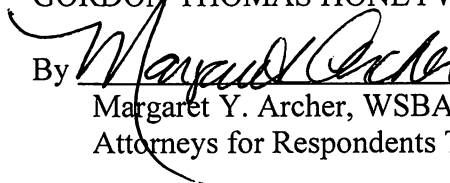
The Board's decision is well-supported by the law and the substantial evidence in the record. The Turners have failed to meet their burden to demonstrate that the Board erred with regard to each of the independent reasons it found the proposed dock does not qualify for a shoreline substantial development permit. They likewise failed to meet their burden to demonstrate that the Board erred when it held that the proposed boat house does not qualify for a shoreline conditional use permit. This Court should affirm the Board's well-reasoned decision.

Dated this 10<sup>th</sup> day of April, 2019.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By



Margaret Y. Archer, WSBA No. 21224  
Attorneys for Respondents Taylor

# DECLARATION OF SERVICE

I, Lisa Blakeney, declare under penalty of perjury under the laws of the State of Washington that I electronically filed the foregoing document with the Clerk of the Court of Appeals, Division II, which will send notification of such filing to all parties of record.

DATED this 10<sup>th</sup> day of April, 2019.

  
Lisa Blakeney

FILED  
Court of Appeals  
Division II  
State of Washington  
4/10/2019 4:40 PM

# APPENDIX A

# Approximate location of nearest docks





Turner - 16 Pt. Posdick Drive NW



Tax Parcels



Disclaimer: The map features are approximate and are intended only to provide an indication of said feature. Additional areas that have not been mapped may be present. This is not a survey. The County assumes no liability for variations ascertained by actual survey. ALL DATA IS EXPRESSLY PROVIDED 'AS IS' AND 'WITH ALL FAULTS'. The County makes no warranty of fitness for a particular purpose. 2017/06/06





Disclaimer: The map features are approximate and are intended only to provide an indication of said feature. Additional areas that have not been mapped may be present. This is not a survey. The County assumes no liability for variations ascertained by actual survey. ALL DATA IS EXPRESSLY PROVIDED 'AS IS' AND 'WITH ALL FAULTS'. The County makes no warranty of fitness for a particular purpose. 2017/06/13

# APPENDIX B

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**SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON**

GORDON BALDWIN, NORMAN SIMON,  
BARBARA SIMON, MARK TAYLOR, and  
SARAH TAYLOR,

Petitioners,

v.

PIERCE COUNTY, CRAIG TURNER,  
KELLEY TURNER, and STATE OF  
WASHINGTON, DEPARTMENT OF  
ECOLOGY,

Respondents.

CRAIG AND KELLEY TURNER,

Petitioners,

v.

PIERCE COUNTY and STATE OF  
WASHINGTON, DEPARTMENT OF  
ECOLOGY,

Respondent.

MARK and SARAH TAYLOR,

Intervenors.

SHB No. 17-005c

**FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER**

On December 27, 2016, the Pierce County Hearing Examiner (Hearing Examiner)  
granted a Shoreline Substantial Development Permit (SSDP) for construction of a pier-ramp-  
float, granted a Shoreline Conditional Use Permit (SCUP) for a boatlift, and denied an SCUP for  
a boathouse. The permit applicants are Craig and Kelley Turner.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER**  
SHB No. 17-005c

1 On March 6, 2017, Gordon Baldwin, Barbara Simon, and Norman Simon filed a petition  
2 with the Shorelines Hearings Board (Board) for review of the SSDP and SCUP issued by the  
3 Hearing Examiner. On March 7, 2017, Mark and Sarah Taylor filed a petition for review of the  
4 approval of the SSDP for the pier-ramp-float and the SCUP for the boatlift. On March 7, 2017,  
5 the Turners filed a petition for review of the decision of the Hearing Examiner denying the  
6 SCUP to construct the boathouse. The three appeals were consolidated. On April 26, 2017, the  
7 Taylors were allowed to intervene in the Turner's appeal of the denial of the SCUP for the  
8 boathouse.

9 The Board conducted a hearing June 26, 2017, in Tacoma, Washington and June 27-28,  
10 2017, in Tumwater, Washington. The Board considering the matter was comprised of Members  
11 Kay M. Brown, Jennifer Gregerson, and Jamie Stephens. Administrative Appeals Judge Heather  
12 C. Francks presided for the Board. Attorney James Handmacher represented Gordon Baldwin,  
13 Barbara Simon, and Norman Simon. Attorney Margaret Archer represented Mark and Sarah  
14 Taylor. Attorney Dennis Reynolds represented Craig and Kelley Turner. Pierce County Deputy  
15 Prosecuting Attorney Cort O'Connor represented Pierce County. Assistant Attorney General  
16 Emily Nelson represented State of Washington, Department of Ecology (Ecology). Kim Otis,  
17 Olympia Court Reporters, provided court reporting services. The Board visited the site, received  
18 the sworn testimony of witnesses, admitted exhibits, and heard arguments on behalf of the  
19 parties. Having considered the record, the Board makes the following decision.

20  
21  
FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER  
SHB No. 17-005c

**FINDINGS OF FACT**

1.

**The Proposal**

The Turners own a waterfront home at 16 Point Fosdick Drive NW on the northeast shore of Hale Passage in Pierce County. They purchased the property five years ago. K. Turner Testimony. The property is .48 acres with 100 feet of shoreline frontage which includes a bulkhead that is approximately four feet high. C. Turner Testimony; Ex. RT-2 at 1. The property is at the very point of the Gig Harbor Peninsula. Ex. RT-5, Appendix A at A.1, A.2.

2.

The property is located in a Rural Residential Shoreline Environment, is zoned Rural 10 and is in the Gig Harbor Peninsula Community Plan (GHPCP) area. Ex. RT-4 at Ex. 3B. The Turners own their private tidclands. K. Turner Testimony. No view easements have been granted over the property. K. Turner Testimony. It is not a critical area under the local critical areas ordinance. Halsan Testimony.

3.

The Turners, through their agent, Carl Halsan, submitted a proposal for an SSDP and SCUP to Pierce County Planning and Land Services to 1) construct a 150 foot long, eight foot wide single use pier-ramp-float; 2) place a 20 foot long, ten foot wide boatlift at the south end of the proposed pier-ramp-float; 3) construct a 192 foot square boathouse landward of the bulkhead; and 4) remove the existing hot tub and construct an integrated swimming pool and hot tub 50 feet from the bulkhead. Ex. RT-2 at 1. The cost of the pier project is \$50,000-\$100,000. C. Turner Testimony.

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
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The Turners plan to use the pier-ramp-float, boatlift, and boathouse to enjoy the water with their three children aged 8-13 and extended family. K. Turner Testimony. They have not yet purchased a boat but they expect it to be approximately 30 feet in order to be large enough to accommodate everyone. C. Turner Testimony. The Turners currently have a kayak and a paddleboard. K. Turner Testimony; C. Turner Testimony.

5.

The boathouse would be used for storage of kayaks, lifejackets, fishing poles, etc. K. Turner Testimony. The Turners also plan an outdoor shower outside the boathouse which is also next to the proposed pool and hot tub. K. Turner Testimony. The boathouse as currently proposed would be 22 feet landward of the bulkhead and 12 feet high. Halsan Testimony.

6.

The proposed pier and ramp would be aluminum and the float would be wood. Halsan Testimony. Using aluminum for the pier and ramp allows for fewer pilings. Halsan Testimony. The proposed pier pilings will be steel. Halsan Testimony. The proposed pier is perpendicular to the shoreline. Halsan Testimony. The railing above the pier will be 42 inches high. Halsan Testimony. The bottom of the pier will be one foot above the bulkhead and the railing is three and a half feet above the pier so the pier and railing together will be a total of four and a half feet above the bulkhead. Halsan Testimony.

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
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1 7.

2 The design for the pier-ramp-float includes a pier that is at least 50% grated, a ramp that  
3 is 100% grated, and a float that is also 50% grated. Halsan Testimony. Grating is designed to  
4 reduce shading to protect fish. Halsan Testimony. In order to avoid the float grounding on the  
5 beach, float stops must hold the float at least two feet above the substrate. Halsan Testimony.

6 8.

7 Although their tidelands are private, the Turners would continue to allow beach-walking  
8 under and around the pier-ramp-float. K. Turner Testimony. Although Ms. Turner testified that  
9 beach-walking is not common, a number of neighbors testified they walked the beach regularly.  
10 K. Turner Testimony; Baldwin Testimony; N. Simon Testimony. Based on the weight of the  
11 evidence, the Board finds that the beach is used regularly for walking.

12 9.

13 In order to assess the clearance to walk below the pier, Mr. Turner measured from the  
14 bulkhead with a level and determined that at 14 feet from the bulkhead there will be 5 feet of  
15 clearance; and at 19'6" from the bulkhead there will be 6 feet of clearance below the pier. C.  
16 Turner Testimony. There will be 40 feet between the four sets of supports that hold up the pier.  
17 C. Turner Testimony.

18 10.

19 The Site

20 The Turner property experiences significant weather impact. Baerg Testimony. Stormy  
21 winter weather tends to come from the south and hits the shore at Point Fosdick. M. Taylor

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
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1 Testimony. At Point Fosdick in front of the Turner property there are turbulent water currents  
2 which cause kayaks, paddleboards, and small boats to stay in close to shore. Exs. PT-7-10.  
3 Boats also tend to come close to shore at Point Fosdick because there are no hazards like reefs  
4 and shoals. T. George Testimony. There are no other docks for over six miles to the east and  
5 one mile to the west of the project site. Ex. PBS-8.

6 11.

7 Kayak clubs in groups come by the Point Fosdick area regularly. S. Taylor Testimony;  
8 Ex. PT-10. This area is also popular for fishing and boating. T. George Testimony. For  
9 example, three dozen boats were out in the Point Fosdick area of Hale Passage when Mr. George  
10 was out on the evening of Sunday, June 25, 2017. T. George Testimony. Fishing boats often  
11 come in close to shore, even after dark. S. Taylor Testimony; Ex. PT-9. These boats are often  
12 coming from the Narrows Bridge probably returning to Wollochet Bay. S. Taylor Testimony.

13 12.

14 **The prior owner and current neighbors**

15 Dr. Baerg owned the property which is now owned by the Turners. He owned the  
16 property for 10 years from approximately 2002-2012, and lived there with his three children.  
17 The Baerg family walked the beach from Narrows Bridge to Wollochet Bay. The family looked  
18 for crabs in front of the Taylors' house in "Crab city." They fished off the bulkhead and off the  
19 beach. Dr. Baerg snorkeled occasionally. His kids also went inner tubing, knee-boarding, and  
20 kayaking. They had a 40 foot boat on a mooring buoy. Dr. Baerg put a solar navigation light on  
21 his boat on the buoy to make sure other boaters could see it. They had a metal bottomed boat

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
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1 that was easy to get kids in and out of off the beach. He also had a rowboat and created a pulley  
2 system to bring the boat in to shore. In Dr. Baerg's opinion, a pier was not necessary to access  
3 the water at the site. He does not believe that a pier necessarily makes water access safer. A pier  
4 could make it dangerous for children falling from height due to the currents. Baerg Testimony.

5 13.

6 Petitioner Gordon Baldwin resides at 26 Point Fosdick Drive NW next door to the  
7 Turners to the west. Mr. Baldwin grew up in the house and inherited it in May 2016 from his  
8 parents who bought it in 1956. Mr. Baldwin walks the beach. A pier will cause him to turn  
9 around or walk in the other direction. He also kayaks in Hale Passage. The pier will require him  
10 to head out into the strong currents beyond the pier. Over the years, Mr. Baldwin's family has  
11 had boats and launched them from the beach. Baldwin Testimony.

12 14.

13 The proposed pier will be visible from Mr. Baldwin's house. In order to estimate the  
14 location of the pier-ramp-float, Mr. Baldwin purchased two ropes measuring a total of 150 feet  
15 and extended them out from the Turner bulkhead when the tide was at a minus 1.5 foot tide.  
16 Baldwin Testimony; Ex. PT-11. The photograph taken of Mr. Baldwin by Ms. Taylor was used  
17 by a professional to do a computer assisted drawing of the project, which is in evidence at Ex.  
18 PT-12. S. Taylor Testimony; Ex. PT-12. The professional also used a copy of the site plan that  
19 was presented to the County to create the drawing. S. Taylor Testimony. Mr. Baldwin believes  
20 that the pier is out of character with the area because it would be the first residential pier.  
21 Baldwin Testimony.

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Petitioners Norman and Barbara Simon reside at 30 Point Fosdick Drive NW, two doors to the west of the Turners. They have lived there since 1994. The Simons had a boat and moored it in Gig Harbor. They walk their dog on the beach twice a day sometimes as far as Wollochet Bay and the Narrows Bridge. Mr. Simon is concerned that the pier might trap driftwood debris or be damaged by floating logs or stumps. In the past, pier debris, tree stumps, and even a sailboat have washed up on the beach. N. Simon Testimony. At the site visit, the Board observed a large tree stump which had drifted onto the beach near the Turner property.

16.

Petitioners Mark and Sarah Taylor live at 14 Point Fosdick Drive NW, next door to the Turners to the east. S. Taylor Testimony. They have lived there since 2004. The Taylors own the house directly upland of their house and rent it to the Turners' in-laws, John and Shelly Turner. S. Turner Testimony.

17.

Looking west towards the Turners' property, the Taylors have a view of the Olympic mountain range over the Turner hedge. S. Taylor Testimony; Ex. PT-4. The Taylors have a boardwalk that runs parallel to their bulkhead and extends about 5'10" waterward from their bulkhead along their beachfront. S. Taylor Testimony; Exs. PT-7, 8. The Taylors have a flagstone patio next to their boardwalk where they can sit and enjoy the view. S. Taylor Testimony; Ex. PT-7. Ms. Taylor enjoys conversing with neighbors as they walk the beach past her property. S. Taylor Testimony.

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The neighbors believe a pier will be a barrier for beach-walkers espccially when the tide is in. S. Taylor Testimony; J. Bowen Testimony; M. Taylor Testimony. As a result, fewer neighbors may pass by. M. Taylor Testimony. The public can access this beach at several locations. There is public access to the beach from Narrows Park which is approximately ¼ mile from the Turner property. S. Taylor Testimony. The Wollochet Bay boat launch is approximately one mile to the west of the Turner property. S. Taylor Testimony. There is also a public access path between the houses approximately 8-10 houses to the west of the Turner house. S. Taylor Testimony. Local residents who live up the hill behind the beachfront houses especially use this path to access the beach. S. Taylor Testimony.

Mr. Taylor kayaks and paddleboards from his beach. The views of Mt. Rainier and the Olympics are spectacular from the water when kayaking and paddleboarding. When kayaking and paddleboarding, Mr. Taylor normally heads west toward Wollochet Bay and hugs the shore because the currents out further are stronger. The currents start 40-50 feet from the bulkhead. One time he was paddling his kayak back from Fox Island and encountered frighteningly large waves in the middle of Hale Passage. He is concerned about the currents if there is a 150 foot pier in front of the Turner property that he will have to paddle around. At certain tidal levels he will not be able to kayak and paddleboard. M. Taylor Testimony.

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In response to Mr. Taylor's concerns, the Turners have stated that they would allow their neighbors to carry paddleboards past their pier to launch them. K. Turner Testimony.

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Mr. Taylor believes that the proposed pier will be an obstruction to their view. M. Taylor Testimony. If the pier is not visible to boaters, it will be a safety issue for boats especially at

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night. S. Taylor Testimony; Baerg Testimony. If the pier is lit up for safety, it will be even more

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visually intrusive. S. Taylor Testimony. Dr. Baerg believes there aren't any other piers in the

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area because the strength of the currents would require a very stoutly built pier which would be

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very expensive and would impact neighbors, boaters, and the entire community. Baerg

11

Testimony. The neighbors are concerned that after the first pier is built, other piers may follow.

12

M. Taylor Testimony.

13

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**Alternative moorage options**

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In October 2016, the Turners, through Harbor Point Holdings LLC, purchased a piece of

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property on the Gig Harbor waterfront. Ex. PBS-1. The location is about a fifteen minute drive

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from the Turner house at Point Fosdick. C. Turner Testimony. The property includes a house, a

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net shed, and a pier. C. Turner Testimony; Ex. PBS-6. The Turners purchased the property to

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acquire local office space. The Turners intend to keep the historic net shed as is. C. Turner

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Testimony.

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The pier on the purchased property is subleased by two parties who moor their boats there. Ex. PBS-6. One is a commercial fisherman and the other owns a recreational boat located on the pier. The Turners intend to lease the pier space to the current lessees indefinitely although the leases can be terminated on ninety days' notice. C. Turner Testimony. The property also included an aquatic land lease from the Washington Department of Natural Resources which was assigned to Harbor Point Holdings LLC as part of the purchase of the property. C. Turner Testimony; Exs. PBS-2, 3.

24.

Neither the Pierce County Planner nor the County Hearing Examiner were aware of the Turners' Gig Harbor waterfront property purchase at the time of the hearing in November 2016. Carlson Testimony. The County Planner Mojgan Carlson testified to the Board that if she had known the Turners had purchased private moorage in Gig Harbor, she would not have approved a single use pier because their private moorage would be a reasonable alternative to a single use pier. Carlson Testimony.

25.

Before commencing this project, Mr. Turner looked for moorage alternatives in Gig Harbor but concluded that some locations were too far away, some were too expensive, and the time it takes to transport people and gear is inconvenient. C. Turner Testimony.

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Mr. Bowen resides a few houses up the beach to the west of the Turner property. J.

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Bowen Testimony; Ex. PT-15. Mr. Bowen keeps a boat in Day Island Marina and estimated that

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it takes 10 minutes to get to Day Island Marina. J. Bowen Testimony. There are also public

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marinas in Gig Harbor. T. George Testimony. It would take about 25-30 minutes for a boat to

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travel from Point Fosdick to Gig Harbor. T. George Testimony.

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8

There was a mooring buoy in place when the Turners bought the property. Four years

9

later the mooring buoy was lost in a storm. If a boat is moored out at the buoy each passenger

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will need to be ferried out to the boat one by one. The Turners rejected that alternative for their

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family. C. Turner Testimony.

12

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On January 15, 2016, the applicant's agent Carl Halsan sent letters to the neighboring

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property owners, the Taylors,<sup>1</sup> and Mr. Baldwin, regarding participating in a joint use dock. Ex.

15

RT-3 at Ex. 2E. Neither neighbor was interested. S. Taylor Testimony; Baldwin Testimony.

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### **County's Review and Process**

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The County Planner reviewed the Turner application, visited the site several times, and

19

then prepared the staff report for the Hearing Examiner. The purpose of the staff report is to set

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forth the facts of the project and analyze its compliance with the relevant zoning regulations

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<sup>1</sup> The Taylors did not receive the letter but testified that they are not interested in a joint pier. S. Taylor Testimony.

1 (PCC Title 18), the GHPCP, Pierce County Shoreline Master Program (SMP), and the Shoreline  
2 Management Use Regulations for Pierce County (PCC Title 20). Carlson Testimony; Ex. RT-2.

3 30.

4 The staff report included an analysis of compliance with the GHPCP. Ex. RT-2 at 9. The  
5 GHPCP includes policies about how the community should be developed including land use,  
6 housing economic development, environmental, and shoreline policies. The GHPCP states that  
7 "piers and docks should be permitted in the Rural Residential Environment" and that "joint use  
8 of piers and docks" should be required "whenever possible." *Id.*

9 31.

10 The County staff report prepared by Ms. Carlson contained the following  
11 recommendation:

12 Staff has reviewed this proposal for compliance with all policies, codes  
13 and regulations. The project, as proposed, is out of character with the  
14 area; however, it meets all the criteria stated within these regulations. Staff  
15 has reservations on construction of the proposed dock at this location since  
16 there are no other docks for over 6 miles to the east and west of the project  
17 site.

18 Ex. RT-2 at 1.

19 32.

20 Ms. Carlson prepared a map showing the distance to the nearest dock<sup>2</sup> in each direction.  
21 Ex. PBS-8. She also prepared a map showing the properties of the neighbors who sent letters<sup>3</sup> to  
the County objecting to the proposal. Ex. PBS-7.

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<sup>2</sup> The Point Fosdick vehicle ferry dock was located several lots to the east of the Turner residence and operated until the 1950s. The proposed pier will be the first pier in the area since that ferry dock was in use. C. Turner Testimony.



33.

Ms. Carlson made the following observations in her report.

"[T]his shoreline area is free from docks. A dock structure with a boatlift could result in a permanent view obstruction to all neighboring properties. In addition, during the majority of daily low tides, moorage of a boat will not be feasible because it will ground out. With the aid of the proposed boatlift, vessels will remain in the tidelands and will create a view impact more consistent with storage than moorage. The intent of the code is to protect view aesthetics; therefore staff believes that construction of a permanent dock will change the nature of the shoreline character in this area and would damage the natural landscape of the shoreline." Ex. RT-2 at 10-11.

"[T]he proposed dock, if approved, will change the structure free character of the shoreline in this area. Ex. RT-2 at 12.

[T]he immediate surrounding properties are not considered high bank waterfront sites and as such if the dock is approved, it will be the only dock in the immediate vicinity of the site that will be highly visible to the neighboring properties. Therefore, staff believes that construction of a permanent dock will permanently create a view obstruction to adjacent residences as well as public view and enjoyment of a natural shoreline area." Ex. RT-2 at 12.

34.

Ms. Carlson analyzed impacts on navigation. In order to determine if important navigation routes are affected by a proposal, the fetch<sup>4</sup> is calculated. Carlson Testimony. The fetch in this area is 4,908 feet across to Fox Island. The proposed pier will be approximately 3% of the fetch. Carlson Testimony; Ex. RT-2 at 4. Although fetch is the main criteria used by staff

<sup>3</sup> By the date of the hearing before the Hearing Examiner more than fifty members of the public had sent letters opposing the proposal. Carlson Testimony. All the letters were submitted to the Hearing Examiner. Carlson Testimony.

<sup>4</sup> Fetch is the horizontal distance across a body of water measured in a straight line from the most seaward point along the ordinary high water line or lawfully established bulkhead on a given stretch of shoreline to the closest point on the ordinary high water line or lawfully established bulkhead on the opposite shoreline. PCC 20.56.010(G).

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1 to determine whether navigation is affected, they also look at activity in the area. Carlson  
2 Testimony.

3 35.

4 Ms. Carlson noted in her report the impacts to marine oriented recreation from the,  
5 proposed pier. She states:

6 "[M]arine oriented recreation will incur an impact as the approval of the  
7 dock could result in rowers/kayakers and swimmers traveling further into  
8 deeper open waters of Hale Passage to navigate around the extreme  
9 waterward end of the float. In addition, if approved, it will create a  
perception to a beach walker that beach access is limited in this area. Ex.  
RT-2 at 12.

10 36.

11 Pierce County conducted a State Environmental Policy Act (SEPA) review for the  
12 project. On August 29, 2016, Pierce County issued a Determination of Nonsignificance (DNS).  
13 Carlson Testimony; Ex. RT-4 at Ex. 3B. The DNS was not appealed. Carlson Testimony; Ex.  
14 RT-1 at 6X.

15 37.

16 The Gig Harbor Peninsula Advisory Council (PAC) considered the proposal at its  
17 regularly scheduled meeting on November 18, 2015, and approved the proposal. Ex. RT-2 at 7.  
18 The PAC advises Pierce County officials including the Hearing Examiner and the Pierce County  
19 Planning and Land Services on land use matters within defined geographic areas. PCC 2.45.010.  
20 The PAC recommended approval of the project, although it expressed concerns including  
21 concerns about cumulative effects of the dock in this area. Ex. RT-2 at 7.

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**Ecology's review**

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39.

Ecology reviews shoreline conditional use permits granted by local governments. Mraz Testimony. Ecology Wetlands and Shoreline Specialist Rick Mraz reviewed the SCUP for the Turner boatlift and prepared a staff report to his supervisor, Perry Lund. Mraz Testimony; Ex. E-3. Ecology reviews the county decision and determines whether it complies with the relevant code provisions. Mraz Testimony. Because the boatlift is attached to the pier-ramp-float, the review was limited to the effect of the boatlift on the pier's normal use which Ecology concluded would be de minimus. Mraz Testimony; Ex. E-3. Ecology recommended the project be approved subject to the conditions set forth by Pierce County. Ex. E-3. Ecology did not review the SCUP for the boathouse because Pierce County had denied that permit. Mraz Testimony; RCW 90.58.140(1). Ecology did not review the County's decision to grant the pier-ramp-float, nor did it take a position on the County's decision. This portion of the project is subject to an

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1 SSDP which is issued by the local government without Ecology review. Mraz Testimony; RCW  
2 90.58.140(2).

3 40.

4 Applicants' proposed changes to the boathouse location

5 The original proposed location of the boathouse was five feet from the bulkhead. The  
6 Turners revised the proposal to locate the boathouse 22 feet back from the bulkhead as an  
7 attempt to address the Taylors' concerns about view impacts. Halsan Testimony. The proposal  
8 before this Board was submitted after the County Planner had completed her review and after the  
9 hearing before the Hearing Examiner. Carlson Testimony. Therefore, the county staff report did  
10 not address the view impact of the proposal. Carlson Testimony. After participating in the site  
11 visit with the Board, Ms. Carlson concluded the Taylors' view is impacted by the proposed  
12 boathouse at 22 feet back from the bulkhead. Carlson Testimony.

13 41.

14 In order to demonstrate the effect of a boathouse on their view, the Taylors placed a 14  
15 foot paddleboard 22 feet back from the bulkhead with a two foot paper at the top of the  
16 paddleboard to estimate the 12 foot height proposal for the boathouse. Exs. PT-2-6. The  
17 photograph of the view with the paddleboard illustrates how the Taylors' entire Olympic  
18 mountain view would be lost if the Turners erected a boathouse in that location. Exs. PT-6; PT-  
19 13.

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42.

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Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. Based

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upon the foregoing Findings of Fact, the Board enters the following:

4

### CONCLUSIONS OF LAW

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1.

6

The Board has jurisdiction over the parties and the subject matter of this case pursuant to

7

RCW 90.58.180(1). Both the scope and standard of review for this matter is *de novo*. WAC

8

461-08-500(1). The Board has jurisdiction to determine whether a permit issued by the Hearing

9

Examiner complies with the Shoreline Management Act (SMA) and the SMP. WAC 461-08-

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335(1); WAC 461-08-505(1).

11

2.

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The Baldwin/Simons and the Taylors have the burden to establish that the permit

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approval for the pier-ramp-float and boatlift is inconsistent with the requirements of the SMA or

14

SMP. RCW 90.58.140(7); WAC 461-08-500(3).

15

3.

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The Turners have the burden to establish that the boathouse permit that was denied is

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consistent with the requirements of the SMA or SMP. RCW 90.58.140(7); WAC 461-08-500(3).

18

4.

19

The following issues were identified by the parties in the Prehearing Order for resolution

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at hearing:

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1. Whether the Turners' proposal for a single use, 150-foot pier-ramp-float complies with applicable provisions of the Shoreline Management Act, the

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Pierce County Shoreline Master Program, and the permit criteria as set forth in PCC 20.56.040(A) so as to qualify for a shoreline substantial development permit?

2. Whether the Turners' proposal for a boatlift complies with applicable provisions of the Shoreline Management Act, WAC 173-27-160, the Pierce County Shoreline Master Program, and the applicable criteria in the Pierce County Shoreline Management Use Regulations, including PCC 20.62.050(2) and PCC 20.72.030, so as to qualify for a shoreline conditional use permit?
3. Whether the Turners' applications for a single use, 150-foot pier-ramp-float and boatlift should be denied based upon cumulative impacts?
4. Whether the Turners' proposal for a 192-square foot boat house complies with applicable provisions of the Shoreline Management Act, WAC 173-27-160, the Pierce County Shoreline Master Program, and the applicable criteria in the Pierce County Shoreline Management Use Regulations, including PCC 20.62.050(2) and PCC 20.72.030, so as to qualify for a shoreline conditional use permit?

5.

**Compliance with SMA and SMP for Pier-Ramp-Float (Issue 1)**

"The policy of the SMA was based upon the recognition that shorelines are fragile and that the increasing pressure of additional uses being placed on them necessitated increased coordination in their management and development." *Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910, 915 (1994). "The SMA does not prohibit development of the state's shorelines, but calls instead for 'coordinated planning ... recognizing and protecting private property rights consistent with the public interest,' " (quoting RCW 90.58.020). *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 46, 202 P.3d 334, 341 (2009)(citations deleted).

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6.

The Turners argue that their proposal involves a preferred use under the policies of the SMA. They base this argument on language in RCW 90.58.020 which provides that, in instances where alterations to the natural shoreline are authorized, priority shall be given to:

single-family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

RCW 90.58.020. This argument has already been rejected by the Washington Courts.

*Samson v. City of Bainbridge Island*, 149 Wn. App. at 50-1. In *Samson*, the Court noted that:

[T]he reference in RCW 90.58.020, to single-family residential uses and their appurtenant structures, does not specifically list docks or piers. Piers are listed however, as a preferred use, under improvements which facilitate public access to the state's shorelines. We conclude that the Legislature purposefully distinguished between public and private piers and did not apply any particular preference to the latter, which would limit public access in, rather than promote public access to the waters of the state.

*Id.* at 50, 51.

7.

The Board concludes that the Turners proposed private single use dock is not a preferred use of the shoreline under the SMA.

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Pierce County, through its SMP, has explained that "It is the intent of Pierce County to encourage the construction of joint use or community use docks and piers whenever feasible so as to lessen the number of structures projecting into the water." PCC 20.56.020. Pierce County allows piers and docks of the size and cost of the Turners' proposed dock, only if they meet the requirements for an SSDP. PCC 20.56.030(B). In Pierce County, an SSDP may be granted only if the proposed development is consistent with the policies of the SMP and with the criteria set forth in PCC 20.56.040. PCC 20.56.040(A). Here the relevant SMP is the Pierce County SMP passed in 1974<sup>5</sup>.

The SMP policies applicable to piers are set out in the SMP Phase I, Goals and Policies, § 5 T, subsections (a)-(o)(SMP Piers Policies). The Turners argue that the SMP Piers Policies do not have separate regulatory effect, and instead are implemented through the promulgated criteria. As support for this argument, they point to PCC 20.20.010, which states:

The use activity regulations are a means of implementing the more general policies of Phase I of the Master Program and the Shoreline Management Act.

PCC 20.20.010 goes on to state, however, that:

Each project which falls within the jurisdiction of the Act will be evaluated to determine its conformance with the use activity regulations *as well as the goals and policies of Phase I of the Master Program.* (emphasis added)

<sup>5</sup> Pierce County has passed a new SMP but Ecology has not yet approved it.



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10.

This language, coupled with the clear statement in PCC 20.56.040A mandating consistency with the policies of the SMP, require that the Board give consideration to consistency with the policies as they have been implemented through the use activity regulations.

11.

The Petitioners argue that the SSDP at issue is inconsistent with SMP Piers Policies (d), (e), and (f). They also argue that the SSDP is inconsistent with regulations PCC 20.56.040.A.1 through A.5 and A.7.

12.

SMP Piers Policy (d) provides that "[p]iers associated with single family residences should be discouraged." Policy (f) provides that the County will "[e]ncourage the use of mooring buoys as an alternative to space consuming piers such as those in front of single family residences." These policies have been implemented through PCC 20.56.040A.5, which provides that "[a] reasonable alternative such as joint use, commercial, or public moorage facilities does not exist or is not likely to exist in the near future."

13.

The Turners did make an attempt to enter into a joint use dock arrangement with both of their neighbors, which was rejected. The Board concludes that this attempt is sufficient to establish that a joint use dock is not an available option for the Turners at this time. However, even though a joint use dock is not an available option, the Board concludes that other reasonable moorage alternatives exist for the Turners.

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14.

The Turners currently own property on the Gig Harbor waterfront that includes private moorage.<sup>6</sup> The Turners contend this moorage is not a reasonable alternative because the two berths at their pier are currently leased to others and expanding the facility would take time and money. C. Turner Testimony. The Board is not persuaded by this argument. The Turners have not presented any persuasive reason why they could not choose to change their leasing arrangements and moor their own boat at their Gig Harbor waterfront pier if they chose to do so. Mr. Turner testified that the leases could be terminated upon 90 days' notice. C. Turner Testimony. When the Turners purchase a boat, if they wish to continue to allow their tenants to use their Gig Harbor moorage, they can moor their boat at a nearby marina like some of their other neighbors. Bowen Testimony; N. Simon Testimony. Alternatively, the Turners could moor their boat at a mooring buoy like Dr. Baerg, the previous owner of the property. Baerg Testimony. The Board concludes that a mooring buoy is a workable alternative for this shoreline property. The previous owner of the Turner property testified that he was able to use a mooring buoy for his boats in Hale Passage. Baerg Testimony.

15.

Here, the Board concludes that a number of reasonable moorage alternatives to a single use pier do exist even if the Turners find them less convenient. Therefore, the Turners' proposed single use pier is inconsistent with PCC 20.56.040A.5.

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<sup>6</sup> Pierce County Planner Carlson testified to the Board that had she been aware of the Turners' ownership of this property before she issued her staff report she would have concluded that a reasonable moorage alternative did exist. Carlson Testimony.

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16.

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Piers Policy (e) provides that "In considering any pier, considerations such as

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environmental impact, navigational impact, existing pier density, parking availability, and impact

4

on adjacent proximate land ownership should be considered." Policy (e) is related to

5

implementing regulations PCC 20.56.040 A. 1, 2, 3, 4 and 7. These regulations provide that:

6

1. Important navigational routes or marine oriented recreation areas will not be obstructed or impaired;

7

2. Views from surrounding properties will not be unduly impaired;

8

3. Ingress-Egress as well as the use and enjoyment of the water or beach on adjoining property is not unduly restricted or impaired;

9

4. Public use of the surface waters below ordinary high water shall not be unduly impaired;

10

7. The intensity of the use or uses of any proposed dock, pier and/or float shall be compatible with the surrounding environment and land and water uses.

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As to the first part of the first regulatory criteria, important navigational routes, the Board

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concludes that, due to the almost 5,000 foot long fetch at the site, these routes will not be

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obstructed or impaired. Ex. RT-2 at 12. However, the Board concludes that the second part of

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the first criteria, marine oriented recreation areas, will be obstructed and impaired by the

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proposed project. Swimmers, paddleboarders, and kayakers will be required to either go around

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or under the pier depending upon the level of the tide. The currents in Hale Passage are stronger

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further from shore and can be frightening even for experienced kayakers. M. Taylor Testimony.

20

Fishing and other boats currently come close into the shore as they round the point and they will

21

have to avoid the pier. Ex. PT-9. After decades without any piers on this shoreline, it would be

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1 a safety hazard for boaters who are not expecting to find a pier 150 feet out from the shore. The  
2 Board notes that this criteria does not require that the impairment be undue; the question is  
3 simply whether marine oriented recreation areas will "be obstructed or impaired." PCC  
4 20.56.040A.1. The Board concludes that the pier will obstruct or impair marine oriented  
5 recreation.

6 18.

7 As to the second criteria, whether views from surrounding properties will be unduly  
8 impaired, the Board concludes that views from the surrounding properties will be impaired but  
9 not unduly. The pier-ramp-float would certainly be a structure in the otherwise structure free  
10 views from nearby neighbors' properties and residences. However, the pier-ramp-float would  
11 not completely block any views. If it is illuminated at night or somehow designed to be more  
12 visible, it could increase the obstruction of the neighbors' views.

13 19.

14 As to the third criteria, undue impairment or restriction on ingress and egress, and use  
15 and enjoyment of the water or beach by adjoining properties, the Board concludes there would be  
16 restriction and impairment by the need to avoid the 150 foot pier but the restriction and  
17 impairment would not be undue. Neighbors who enjoy beach walking would need to either duck  
18 under or walk around the pier depending upon the water level. Neighbors who swim,  
19 paddleboard, or kayak would need to go out into the strong current or pass under the pier to  
20 access the water.

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As to the fourth criteria, undue impairment of the public's use of waters below ordinary high water, the Board concludes that public use of the surface waters below ordinary high water would be impaired by the need to avoid the pier when swimming, paddleboarding, kayaking, or boating but the impairment would not be undue.

21.

As to the seventh criteria, whether the intensity of the use is compatible with the surrounding land and water uses, the Board has already found that this beach is regularly used by the public for walking. There is currently a seven mile stretch of beach that is unimpaired with piers and provides the public with an excellent place to enjoy a long walk on the beach with beautiful views of the water, the Olympics, and Mount Rainier. Furthermore, the near shore water in this area is heavily used for boating, kayaking, and paddleboarding. The proposed pier would present an impediment to all of these public uses.

22.

Based on Piers Policy (e), the Board also interprets PCC 20.56.040.A.7 as addressing existing pier density. Here, there are no piers on a seven mile stretch of shoreline that is used by the public.

23.

The Turners argue based on *May v. Robertson*, 153 Wn. App. 57, 218 P.3d. 211 (2009), that their proposed pier cannot be denied merely because it will be the first pier in the area and it will therefore change the visual effect of the shoreline. Turner Prehearing Brief, p. 7. The *May*

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1 decision, however, does not support the Turners' application. One key distinction between the  
2 pier at issue in *May* and the Turners' proposed pier, is that the pier in *May* was a joint use pier.  
3 The *May* Court, in reaching its decision, relied heavily on this fact coupled with the Pierce  
4 County policies that strongly encourage joint use facilities. 153 Wn. App at 80-87.  
5 Furthermore, because it was a joint use dock, it was not necessary for the applicant to consider  
6 reasonable alternatives.

7 24.

8 The dock at issue here, in contrast, is a single use facility. While the Turners attempted  
9 unsuccessfully to engage their neighbors in a joint use dock, this does not excuse them from the  
10 requirement to consider the availability of other alternatives. The Board has already concluded  
11 that other reasonable alternatives to a single use pier are available.

12 25.

13 Another significant difference between this situation and the *May* case is that the  
14 proposed pier will have more impact than just the visual one of being the only pier within a  
15 seven mile stretch of beach.<sup>7</sup> Due to its proposed location protruding 150 feet out on the very  
16 point of the Peninsula, and the heavy use by fishing boats, kayakers, and paddleboards that hug  
17 the shoreline to avoid the turbulent waters further out from the point, the Board has concluded  
18 that this proposed pier will interfere with marine oriented near shore recreation. Furthermore,  
19 the pier will interfere with the use of this seven mile stretch of pier free beach by walkers.  
20 Unlike in *May*, where the Court observed that "the joint-use pier would not conflict with the

21 \_\_\_\_\_  
<sup>7</sup> In *May*, the Court noted that "[T]hree 50-foot piers and one 150-foot pier are visible on either side of this beach..."  
153 Wn. App at 63.

1 area's Rural Residential Environment shoreline designation or the area's existing land and water  
2 activities" this single use pier, given its location on the very point of the Peninsula, would create  
3 such a conflict. *May*, 153 Wn. App at 87.

4 26.

5 In summary, the Board concludes that the pier-ramp-float is inconsistent with the SMP  
6 policies on piers and fails to satisfy PCC 20.56.040A.1 and A.7. As a result, the Hearing  
7 Examiner's decision should be reversed and the SSDP should be denied.

8 27.

9 **Boatlift (Issue 2)**

10 The Turner's proposal to the County included a 20 by 10 foot boatlift attached to a pier-  
11 ramp-float. Because the Board is denying the SSDP for the pier-ramp-float, the boatlift as  
12 applied for is no longer feasible. There was no evidence presented of a project with the boatlift  
13 not attached to a pier-ramp-float and therefore the Board does not further analyze the boatlift  
14 separately.

15 28.

16 **Cumulative Impacts (Issue 3)**

17 Petitioners Baldwin/Simon argue that the cumulative impacts of approval of the Turner  
18 project require denial of the application. The Board has held in past cases that it may consider  
19 cumulative impacts resulting from the approval of an SSDP pursuant to the SMA and local SMP,  
20 separate from SEPA. *Garrison v. Pierce County (De Tienne)*, SHB 13-016c at 53 (January 22,

21  
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1 2014), affirmed, *De Tienne v. Shorelines Hearings Bd.*, 197 Wn. App. 248 (2016). In the

2 *Garrison* decision, the Board stated:

3 The Supreme Court has, in fact, recognized that approval of one project can  
4 set a precedent for others to follow, and that it is proper for the Board to  
5 consider cumulative impacts that might occur from the granting a substantial  
6 development permit. *Id.*, citing *Skagit County v. Department of Ecology*, 93  
7 Wn.2d 742, 750, 613 P.2d 121 (1980).

8 *Garrison*, at 53-54.

9 29.

10 The factors the Board weighs in considering whether a cumulative impacts analysis is  
11 required for an SSDP are listed below:

- 12 1. Whether a shoreline of statewide significance is involved;
- 13 2. Whether there is potential harm to habitat, loss of community use, or a  
14 significant degradation of views and aesthetic values;
- 15 3. Whether a project would be a "first of its kind" in the area;
- 16 4. Whether there is some indication of additional applications for similar  
17 activities in the area;
- 18 5. Whether the local SMP requires a cumulative impacts analysis be  
19 completed prior to the approval of an SSDP;
- 20 6. The type of use being proposed, and whether it is a favored or disfavored  
21 use.

*Garrison*, SHB 13-016 at 54-55.

30.

31 The Turners' proposed single use pier-ramp-float is a disfavored use under the SMP. The  
32 150 foot pier-ramp-float would be the first of its kind in this seven mile stretch of beach.  
33 Allowing the first pier would set a precedent for allowing other similarly large piers in this area.  
34 The cumulative impacts of this pier, and future piers, would degrade aesthetic values. There  
35 would be a loss of community uses. Beach-walkers would be obstructed and marine recreation

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1 would be affected. Kayakers, paddleboarders, and small fishing boats would be forced to go  
 2 further off shore into the turbulent waters of Hale Passage. The views of the public walking on  
 3 the beach or using the water in this area, and the views of all of the neighbors including those up  
 4 the hill above the project would be impacted. The Board concludes that approval of this SSDP  
 5 for a single use pier-ramp-float in this location would likely have cumulative impacts.

6 31.

7 **Boathouse Compliance with SMA, SMP, and Regulations (Issue 4)**

8 The Turners argue that the boathouse SCUP was unreasonably denied. The SMP defines  
 9 "Boathouse" as "A covered or enclosed moorage space." PCC 20.04.030. As the Hearing  
 10 Examiner noted:

11 The proposed boathouse does not fit the definition of a boathouse because  
 12 moorage is not possible. Making it further unlikely that the boathouse will  
 13 ever be used for moorage is the fact that the applicant is asking for a 20 by  
 14 ten boatlift presumably for mooring a boat.

15 Ex. RT-1 at 8X.

16 32.

17 The Turners testified that they would use the boathouse to store their kayak,  
 18 paddleboard, fishing equipment, lifejackets, etc. A boathouse is not necessary in order to  
 19 have a kayak or paddleboard available for use. Neighbors store their kayaks and  
 20 paddleboards on their property or in the garage. S. Taylor Testimony. The proposed  
 21 boathouse is adjacent to the proposed pool and hot tub, suggesting that it will be as  
 equally used to store pool toys as it is used to store kayaks and paddleboards.<sup>8</sup>

<sup>8</sup> The Turners' application stated that "the boathouse is for storing water toys and equipment." RT-3, §6b.

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The criteria for a conditional use permit for an accessory use within the 50-foot setback is

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set forth in PCC 20.62.050D.2 which provides:

4

Any water dependent accessory use may be allowed within the 50 foot setback upon the issuance of a Conditional Use Permit. The issuance of a Conditional Use Permit shall be predicated upon a determination that the project will be consistent with the following Conditional Use criteria and the Conditional Use criteria in WAC 173-14-140<sup>9</sup> and will cause no reasonable adverse effects on the environment and other uses.

5

6

7

Conditional Use Criteria:

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- a. Views from surrounding properties will not be unduly impaired.
- b. Adequate separation will be maintained between the structure and the adjacent properties and structures.
- c. Screening and/or vegetation will be provided to the extent necessary to insure aesthetic quality.
- d. Design and construction materials shall be chosen so as to blend with the surrounding environment.
- e. No additional harm to the aquatic environment will result from the reduced setback.

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PCC 20.72.030 adds additional requirements for conditional uses including "that there is some necessity for a shoreline site for the proposed use or that the particular site applied for is essential for this use."

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35.

The Board concludes that the Turners have failed to demonstrate that the boathouse is a water dependent use<sup>10</sup>. Water dependent uses are defined as "[a]ll uses

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<sup>9</sup> WAC 173-14-140 was repealed October 31, 1996.

<sup>10</sup> The Turners argue that the boathouse need not be a water dependent use citing PCC 20.62.030A1-5. However, because the boathouse is proposed to be within the 50 foot setback from the ordinary high water

1 which cannot exist in any other location and are dependent on the water by reason of the  
2 intrinsic nature of the operation.<sup>2</sup> PCC 20.04.670. Because this structure is not planned  
3 to be used for boat moorage it does not need to be within the setback from the bulkhead  
4 or even in a shoreline location.

5 36.

6 The Turners also failed to demonstrate the boathouse would not unduly impair neighbors'  
7 views. As demonstrated by the Taylors in a series of photographs, a 12 foot high boathouse 22  
8 feet back from the bulkhead would completely eliminate their view of the Olympic Mountains  
9 from inside their house. S. Taylor Testimony; Exs. PT 2-6, 13. The Board concludes this  
10 impairment of the Taylors' view to be undue.<sup>11</sup>

11 37.

12 The Board concludes that a location within the setback from the bulkhead or even a  
13 shoreline site is not necessary for kayak and paddleboard storage. The Hearing Examiner  
14 correctly denied the SCUP for the boathouse.

15 38.

16 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based  
17 upon the foregoing Findings of Fact and Conclusions of Law, the Board enters the following:

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21 line, it can be permitted only through the issuance of an SCUP, and only if it is a water dependent  
accessory use. PCC 20.62.050 D.1, D.2.

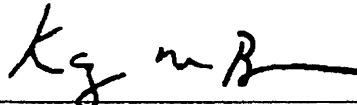
<sup>11</sup> The County Planner agrees with this conclusion. Carlson Testimony.

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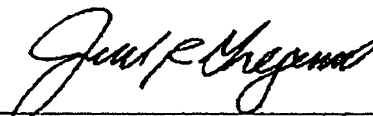
**ORDER**

The decision of the Pierce County Hearing Examiner on Shoreline Substantial Development Permit and Shoreline Conditional Use Permit SD/CP21-15 Application Numbers 813160, 813158, and 813162 is REVERSED in part and AFFIRMED in part. The SSDP for the pier-ramp-float is denied and the SCUP for the boatlift is denied. The SCUP for the boathouse is denied.

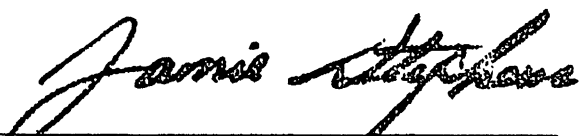
SO ORDERED this 1st day of September, 2017.

**SHORELINES HEARINGS BOARD**

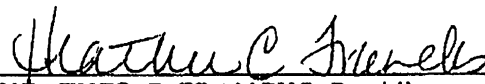
KAY M. BROWN, Member



JENNIFER GREGERSON, Member



JAMIE STEPHENS, Member



HEATHER C. FRANCKS, Presiding  
Administrative Appeals Judge

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# APPENDIX C

### USE ACTIVITY POLICIES

Shoreline use activities are specific classifications of the various types of activities which can be anticipated to occupy shoreline locations.

The Department of Ecology final guidelines for Master Program development established twenty-one use activities and set minimum guidelines for managing each activity. In addition to this the Citizens' Advisory Committee added four use activities which they felt were needed in order to effectively manage the shoreline areas of Pierce County.

Use activity policies are a means of guiding types, locations, designs, and densities of the future shoreline developments. These general policies are implemented by the use regulations which are included in Phase II of the Master Program.

The policies and regulations of each use activity have been developed on the premise that all appropriate shoreline uses require some degree of control in order to minimize adverse affects to the shoreline environment and adjoining properties.

Each project which falls within the jurisdiction of the Act will be evaluated to determine its conformance with the policies and regulations of the appropriate use activities.

- (n) Efforts should be made to locate roads in such a manner that does not limit access to the shoreline.
- (o) Prior to the site preparation or construction of new roads or railroads, near the shoreline, of any type, an environmental impact study should be made in accordance with Washington State Environmental Policy Act of 1971.
- (p) New, efficient, pollution-free methods of transportation which have fewer environmental effects than present transportation methods should be encouraged.

Piers:

- (a) Piers in conjunction with marina development in appropriate areas should be allowed.
- (b) Piers in conjunction with recreational development in appropriate areas should be allowed. Consideration should be given to size and intensity of uses in relation to adjacent shoreline uses.
- (c) Piers for commercial facilities should be discouraged unless they are an integral part of the commercial operation.
- (d) Piers associated with single family residences should be discouraged.
- (e) In considering any pier, considerations such as environmental impact, navigational impact, existing pier density, parking availability, and impact on adjacent proximate land ownership should be considered.
- (f) Encourage the use of mooring buoys as an alternative to space-consuming piers such as those in front of single family residences.
- (g) Piers should not be built for the purpose of storing vehicles and/or boat trailers.
- (h) Piers and floating docks should be encouraged to be built perpendicular to the shoreline rather than along it.
- (i) Encourage pier construction to include larger spans on fewer pilings rather than smaller spans and more pilings. Piers in marine waters may provide habitat suitable for predatory fish with consequent detriment to young salmonids.
- (j) When plastics or other non-degradable materials are used in pier construction precautions should be taken to insure their containment.
- (k) Encourage the formulation and enforcement of pier maintenance regulations. Encourage regulations governing removal of piers and restoration of pier sites when no longer in use.

- (l) The use of floating docks should be encouraged in those areas where scenic values are high and where conflicts with recreational boaters and fishermen will not be created.
- (m) Open-pile piers should be encouraged where shore trolling is important, where there is significant littoral drift and where scenic values will not be impaired.
- (n) Priority should be given to the use of community piers and docks in all new major waterfront subdivisions. In general, encouragement should be given to the cooperative use of piers and docks.
- (o) Areas having a significant near shore fishery should not be used for floating docks.

Educational & Archeological Areas & Historic Sites:

- (a) Archeological areas, ancient villages, military forts, old settlers homes, ghost towns, historic trails, kitchen middens, and historical cemeteries are nonrenewable resources and many are in danger of being lost through present day changes in land-use and urbanization. Because of their rarity and the educational link they provide to our past, these locations should be preserved.
- (b) Professional archeologists should be consulted to identify and maintain an inventory of areas containing potentially valuable archeological data, and to establish procedures for salvaging the data.
- (c) Where possible, sites should be permanently preserved for scientific study, education, and public observation. In areas known to contain archeological data, local governments should attach a special condition to a shoreline permit providing for a site inspection and evaluation by an archeologist to ensure that possible archeological data are properly salvaged. Such a condition might also require approval by local government before work can resume on the project following such an examination.
- (d) Shoreline permits, in general, should contain special provisions which require developers to notify local governments if any possible archeological data are uncovered during excavations.
- (e) Consideration should be given to the National Historic Preservation Act of 1966 and chapter 43.51 RCW provide for the protection, rehabilitation, restoration and reconstruction of districts, sites, buildings, structures and objects significant in American and Washington history, architecture, archeology or culture.



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Sender Name: Lisa Blakeney - Email: lblakeney@gth-law.com

**Filing on Behalf of:** Margaret Yvonne Archer - Email: marcher@gth-law.com (Alternate Email: lblakeney@gth-law.com)

Address:  
1201 PACIFIC AVE  
STE 2200  
TACOMA, WA, 98402  
Phone: (253) 620-6500

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- jvhandmacher@bvmm.com
- lalseaef@atg.wa.gov
- pcpatvecf@co.pierce.wa.us
- sktoma@bvmm.com

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**Filing on Behalf of:** Margaret Yvonne Archer - Email: marcher@gth-law.com (Alternate Email: lblakeney@gth-law.com)

Address:  
1201 PACIFIC AVE  
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